(24,076)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 378.

THE DAYTON COAL & IRON COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, AND WESTERN ATLANTIC RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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a Filed Nov. 20, 1913. S. E. Cleage, Clerk. Jas. T. Joy, Deputy Clerk.

TRANSCRIPT.

Chancery Court of Hamilton County.

12597.

Parties.

THE DAYTON COAL & IRON CO., LTD.,
vs.
C., N. O. & T. P. RAILWAY COMPANY, N., C. & ST. L. RAILWAY CO., & W. & A. RAILROAD COMPANY.

Solicitors:

Burkett, Miller & Moore.
Brown, Spurlock & Brown.
Pritchard, Allison & Lynch.

M. M. Allison, J. J. Lynch, Foster V. Brown, Frank Spurlock, Joseph E. Brown, Sureties.

1 At a regular term of the Chancery Court of Hamilton County, Tennessee, begun and held at the Court House, in the City of Chattanooga, said County and state, on the first Monday, it being the 2nd day of June, 1913, present and presiding the Honorable T. M. McConnell, in and for the Third Chancery Division of said State, the following proceedings were had, viz:

Style of Suit.

No. 12597.

DAYTON COAL & IRON COMPANY, LIMITED,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. et als.

Prosecution Bond, Filed May. 10, 1911.

We hereby acknowledge and bind ourselves security for the payment of all costs that may be adjudged against the complainants in this suit.

This May 10, 1911.

MILLER & SWAFFORD.

2 *Original Bill, Filed May 10", 1911.*

To the Honorable T. M. McConnell, Chancel-or, etc., Holding the Chancery Court at Chattanooga, Tennessee:

THE DAYTON COAL & IRON CO., LIMITED, a Corporation, Doing Business in Tennessee, with an Office, Agency and Place of Business at Dayton, Rhea County, Tennessee, Complainant,

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., NASHville, Chattanooga & St. Louis Railway, and Western & Atlantic Railroad Co., all Corporations, Having Offices, Agents and Places of Business in Hamilton County, Tennessee, and all Doing Business in the State of Tennessee, Defendants.

Complainant respectfully shows to the Court:

I.

That above named Cincinnati, New Orleans & Texas Pacific Railway Co. popularly known and hereinafter referred to as Cincinnati Southern Railway; Nashville, Chattanooga & St. Louis Railway popularly known and hereinafter termed N. C. & St. L. Ry.; and Western & Atlantic Railroad Co., generally known and hereinafter called W. & A. R. R. Co. are all railroad corporations, owning, operating, leasing or otherwise controlling certain lines of railroad and engaged, directly or indirectly, in operating railroads and carrying freight and passengers for hire; and they have been — engaged for many years last past, dating prior to the year 1900.

W. & A. R. R. Co. owns a line of railroad extending from Cartersville, Ga. and other points in that vicinity to Chattanooga, Tenn. and has owned said line continuously since prior to 1900.

N. C. & St. L. Ry. has operated said line from Cartersville and other points to Chattanooga, for several years past and since prior to 1906, under some kind of an arrangement or agreement
3 with the owner W. & A. R. R. Co. but just what that arrangement is, complainant does not know. Presumably, it is in whole or in part based on a profit sharing contract, or it may be for a stipulated rental without contingency; or it may be a fixed sum in part and a certain contingent excess to be paid, dependent on the earning capacity of said line of road thus leased to or operated by N. C. & St. L. Ry. Co.

At any rate, the relations between said supposed lessor and lessee are very intimate so far as the shipping public is concerned and in the promulgation of tariffs, rate sheets and other information in which the shipping public is interested, the names of said last two corporations are used almost synonymously and indiscriminately, which is to say that one of them is frequently named as a carrier and immediately following this name the name of the other appears in a parenthesis, as if the two were to all intents and purposes, as

respects the shipper, one and the same corporation. But complainant avers that this is not the fact.

II.

For some years prior to 1907, complainant had been and still is engaged in the manufacture of pig iron at Dayton, Tenn. where its plant, consisting of blast furnaces, was and is located. In its business, complainant has for years past consumed large quantities of iron ore, much of which ore has been shipped to Dayton over the lines of railroad operated or owned by defendants, one of which lines is a railroad extending from Chattanooga, Tenn. to Cincinnati, Ohio via Dayton, Tennessee, which latter is a point some 38 miles northward from Chattanooga. This line of railroad has been operated by defendant Cincinnati Southern R'y either as lessee or owner, or under some other kind of an arrangement with the lessee or owner, for a number of years last past, and since prior to 1903, whereby said Cincinnati Southern Railway has exercised exclusive proprietary rights and has promulgated tariffs, rate
4 sheets, and other matters in which the public is interested, from time to time, and has not only held itself out as being a railroad corporation with full power and authority to make contracts, respecting shipments of freight, name through freight rates, and do other acts such as usual and customary in matters of this kind by railroad corporations, but it has in fact been and is an acting railroad corporation with full power and authority in this behalf.

III.

While the defendants were each and all engaged in business as hereinbefore shown, and while complainant was engaged as shown above, it purchased or contracted for a quantity of iron ore at or near Cartersville, Ga., and then contracted for same to be delivered to its yard at Dayton, Tennessee at the price of 60 cts. per ton of 2240 pounds. This contract, although contemplating that the ore was to be hauled over tracks of W. & A. R. R. Co. under the arrangement with N. C. & St. L. Ry. before shown, was made directly with Cincinnati Southern Ry. And in making such contract, complainant looked upon and dealt with said Cincinnati Southern as the agent and representative of itself and its co-defendants for the purpose of naming rates and making contracts for the delivery of ore from Cartersville, Ga. and other points along the line of W. & A. R. R. Co. to Dayton, Tenn. And it is charged that Cincinnati Southern Railway had full power and authority in this behalf. Moreover, if it did not have such power and authority in the first instance, it was held out to the shipping public as having such authority by its co-defendants herein, and was allowed to act as their agent and representative whereby the public was misled, into believing that such power and authority did exist; and its co-defendants from time to time confirmed the action of Cincinnati Southern Railway by executing contracts by it made for such deliveries from

Cartersville and other points. And complainant from time
5 to time paid the Cincinnati Southern Railway Co. the full amount of freight charges on ore from Cartersville, Ga. and other points, under the impression and in the full belief that the payee was authorized to receive and receipt for moneys thus paid.

This arrangement continued for a long period of time, prior to 1907, and at no time was any question raised by either of its co-defendants as to the right of Cincinnati Southern Railway to receive and receipt for their respective portions of the entire freight charge from Cartersville, Ga. and other points to Dayton Tenn. and make division and settlement with them accordingly.

IV.

While all parties hereto were engaged as before shown, complainant, about the beginning of 1907, contemplated contracting for a large delivery of iron ore to be shipped from Cartersville, Ga., or nearby points, to it at Dayton, Tenn. over the line of W. & A. Ry. operated by N. C. & St. L. Ry. as before shown. According to custom, before making contracts for such ore, complainant applied to Cincinnati Southern R'y for freight rate from Cartersville, Ga. and other points, it having full notice of complainant's reason for such inquiry.

Complainant, in response to this inquiry, was named a freight rate of $.60 per ton of 2240 pounds, to cover carriage from Cartersville, Ga. and nearby points, to Dayton, Tenn. via. Chattanooga, over the lines of railroad aforesaid. This was the rate which complainant had been paying for a considerable time prior thereto under previous contracts, but as complainant contemplated making an ore contract extending over a long period, and desired to approximate in advance the expense incident to the delivery of ore to it at Dayton, Tennessee, it was deemed advisable in the usual course of business, to make inquiry, as stated, which was done.

Having received the quotation shown, complainant prepared a preliminary cost sheet, and finding that ore purchased at Cartersville or vicinity at a certain price and shipped to Dayton,
6 Tenn. at the rate of $.60 per ton as aforesaid, should be profitably converted into pig iron, made contract for the purchase and mining of such ore accordingly.

V.

Sometime thereafter, ore shipments were billed to complainant by Cincinnati Southern Ry. at $.70 per ton instead of $.60 as per previous quotation, whereupon complainant demurred, and insisted to Cincinnati Southern Ry. said billings were excessive and in violation of contract. Cincinnati Southern Ry. had always carried up to this time (and continued thereafter so to do) the entire freight charge, and complainant had never known either of the other defendants, save as a concurring or connecting carrier for whom Cincinnati Southern Ry. was authorized to act, both in making contracts and in making settlements.

When this controversy arose, complainant declined to pay the difference of $.10 per ton, and after some delay this matter was adjusted by Cin. Southern Ry. allowing complainant credit at the rate of $.10 per ton on bills rendered for ore shipments, on condition that the other line or lines of railway interested would agree thereto. Or, in other words, Cin. Southern Ry. rendered bills monthly for ores shipped at the rate of $.70 per ton, and then credited such bills with $.10 per ton (Conditioned as aforesaid) and complainant paid the difference. In this way, matters progressed for many months, and until the difference, or $.10 per ton on ore thus shipped, amounted to between $4000.00 and $5000.00. From the very ourset, Cincinnati Southern Ry. was put on notice that complainant would not pay this extra charge of $.10 per ton, and through it complainant charges its co-defendants were also put on such notice. Complainant was practically at the mercy of defendants, in this, that having contracted to take the ore, aforesaid, it was compelled to receive same at the contract price at Cartersville or vicinity, and after so receiving said complainant could not transport to Dayton otherwise than by way of defendants' said lines of railroad. Any
7 other method of transport would have been suicidal from a financial standpoint. There are no other lines of road over which complainant could have shipped, except at a heavy loss, and this the defendants well knew. Hence, complainant received the bills as rendered by Cin. Southern Ry. at Dayton monthly during the period stated.

VI.

Several months ago, and at the expiration of said ore contract, Cincinnati Southern Ry. demanded of complainant settlement of the balance aforesaid, and complainant still refused to pay; whereupon about Apr. 3rd, 1911, defendant Cincinnati Southern Ry. instituted a suit against complainant in the U. S. Circuit Court in and for the Southern District, Western Division of Ohio, seeking to recover of complainant an alleged indebtedness of $4933.08 with interest on various items thereof, all as shown in and endorsed on a summons issued out of said court, copy of which was served on complainant and is herewith filed marked Exhibit 1 hereto and made part hereof, but not for copy. Said suit is pending undisposed of, and no judgment by default or otherwise has been entered herein, no step taken and nothing further has been done than the simple filing of said suit and service of process. But complainant charges that the plaintiff in said suit may at any time *more* for default judgment, and will do so unless defense be made therein or the prosecution of said suit be enjoined.

Complainant charges that it has a valid defense, in and against said suit, and that same is in part legal and in part equitable, and it further charges that the co-defendants of Cincinnati Southern Ry. are necessary and proper parties to a determination of the matters in controversy in said pending suit, all for reasons shown herein.

8

VII.

(1) Altho' not privies thereto in name and by express contract, yet the co-defendants of Cin. Southern Ry. are bound by its contract of $.60 per ton, because in making such contract and quoting said rate, Cin. Southern Ry. was expressly authorized by its co-defendants to act for them and was their agent in this behalf.

(2) If not expressly authorized, Cin. Southern Ry. had been held out by its co-defendants as having authority to bind them, and they are equitably estopped to deny its authority and to question its action in the premises.

(3) At and prior to the date of the quotation above of $.60 per ton, to complainant, there was an existing or through freight rate from Cartersville, Ga., and said other nearby points to Dayton, Tenn., on iron ore of $.60 per ton, effective about Nov. 6, 1906, up to February or March, 1909, and probably thereafter, which rate was concurred in and filed with the Interstate Commerce Commission of the United States of America, by both Cincinnati Southern and N. C. & St. L. Ry. This through rate, while not concurred in by W. & A. R. R. Co. as complainant is advised, is nevertheless binding on this latter corporation, for the twofold reason that its co-defendant N. C. & St. L. Ry. had authority to bind it to such rate, and secondly, if it did not have such authority, it has been held out to the world as being fully authorized to make contracts and concur in freight rates and publish tariffs respecting any and all contracts whereby shipments were to be transported over tracks of W. & A. R. R. Co. from Cartersville and other points to Dayton, Tennessee via Chattanooga.

(4) During the period aforesaid and during the entire period of controversy herein, there was effective from Cartersville and other points nearby to Chattanooga, Tenn., over the tracks and line of railroad aforesaid, a rate of $.40 per ton on ore shipments of character similar to those which complainant received, and during this

9 entire time there was effective a rate from Chattanooga, Tenn., to Dayton, Tenn., over line of Cincinnati Southern Railway a freight rate of $.20 per ton; such rates were respected by the defendants in the cases of other shippers during said period. Thus it will be seen that if complainant had caused its ore to be billed from Cartersville to Chattanooga and then rebilled from Chattanooga to Dayton, it would have received a rate of $.60 per ton, whereas, instead of imposing on defendants the trouble of re-billing, it is now expected, for its saving of them this trouble, to pay a premium of $.10 per ton. This, notwithstanding carriers almost universally contend that a through freight rate is cheaper than one that necessitates a re-billing at intermediate points. Complainant further charges that during this entire period the respective defendants did deliver ore and other material of that class from Cartersville to Chattanooga at a rate of $.40 per ton, and from Chattanooga to Dayton at a rate of $.20 per ton, thus giving to complainant's competitors in Chattanooga and at other points a concession of $.10 per ton as compared with the rate now proposed to be charged it. It therefore charges the action of defendants is discriminating, and

for this reason unlawful, and hence it should not be required to pay same.

(5) Having regard alone to the published tariffs governing ore shipments aforesaid, complainant is informed, believes and charges that there was at the date of its contract for this ore and previous thereto, and at the date of the quotation of the 60 ct. rate by it received from Cin. Southern Railway, a published and posted rate sheet in the office of said Railway at Dayton, Tenn., effective from and after Jan. 26, 1907, on and in which was contained and set forth a rate of $ 60 per ton of 2240 pounds on ore from Cartersville, Ga., in which the connecting carrier (W. & A. Ry. as there shown) was to receive $.40 per ton, and Cincinnati Southern Ry. $.20 per ton.

10 Complainant avers that this published freight or tariff sheet is binding on the two corporations named therein, because they both expressly assented thereto, and it is likewise binding on N. C. & St. L. Ry. because it, although not a party thereto in name, expressly assented to said rate, and if it did not do so, is estopped to deny that it did, for the reason that it held its co-defendants out to the World as having power and authority to bind it thereby and under the name of W. & A. R. R. Co. it being the lessee of the tracks of said latter corporation, as before shown.

VIII.

Despite the facts above, Cincinnati Southern Ry. now claims that neither of its co-defendants sanctioned or assented to its action in naming the sixty cent rate, and both its co-defendants make similar claim. Because of the peculiar relation between these three defendants and especially between W. & A. R. R. Co. and N. C. & St. L. Ry. complainant is led to believe and hence charges that said two latter corporations are acting in col-usion, for the express purpose of defrauding it; and to more effectively accomplish this purpose, as shown, the name of one of them is used in some instances and the name of the other in other cases, apparently interchangeably, and without regard to their separate existence. Thus, when it suits their purpose best to insist that the contract relied on by the shipper should have been concurred in by the other corporation, such position is taken, and vice versa. To such an extent has this practice been indulged that complainant does not know today whether it is one, both or either of these corporations that is entitled to or claims the extra ten cent charge which Cincinnati Southern Ry. is now suing to collect. Its claim is predicated, however, on the theory that one or both its co-defendants, without notice to it, increased the freight charge from Cartersville to Chattanooga almost immediately after complainant's ore contract was made, to $.50 per ton, on ore shipped to Dayton, Tennessee, and that

11 it, Cincinnati Southern Ry. has been or will be forced to pay one or both its co-defendants on this basis. At one time, Cincinnati Southern Ry. claimed it had made payment on a fifty cent basis, but complainant charges this is not the fact. It avers that there is a system of accounts current or periodical debits and

credits rendered by and between the defendants hereto, they being connecting carriers, and that periodically, when balances are determined, they are simply carried forward, and charged to the account of the debtor, and that the balances are always book or paper balances.

Cincinnati Southern Ry. does not make any claim whatsoever against complainant, except for the reason either that it has paid or will be called upon to pay one or both its co-defendants the additional $.10 per ton, so that said co-defendants may receive $.50 per ton instead of $.40 for ore shipments received by complainant. Wherefore, complainant insists that the co-defendants of Cincinnati Southern Ry. are necessary parties to this litigation.

IX.

The premises seen, complainant prays that process issue requiring defendants to answer, but not under oath, which is waived. That a writ of injunction issue restraining Cincinnati Southern Ry. from further prosecuting and from taking any step whatsoever in Suit No. 6720 of "The Cincinnati, New Orleans & Texas Pacific Ry. Co. vs. The Dayton Coal — Iron Co. Limited" pending in U. S. Circuit Court, Western Division, Southern District of Ohio, pending this present litigation and that on the final hearing such injunction be made perpetual, and that the subject matter of said suit be herein enjoined, together with the facts and circumstances surrounding and pertaining thereto, as herein shown, be inquired into and determined in this cause, and if the defendants or either of them have any claim whatsoever against complainant because of the matters herein shown, that same be presented and determined herein. And that on the final hearing it be decreed that neither of defendants has any
12 claim in law or equity against complainant, because of the matters herein shown.

Grant general relief, including decree for costs.

This is the first application for an injunction herein.

THE DAYTON COAL & IRON CO.,
LIMITED,
By MILLER & SWOFFORD, *Solicitors.*

MILLER & SWOFFIRD,
Sols. for Complainant.

STATE OF TENNESSEE,
Hamilton County:

W. B. Miller, being sworn, says he is solicitor for complainant in the foregong suit; that complainant has no office, agent or representative in Hamilton County, Tennessee, save affiant; that he has read the foregoing compliant and that the statements therein made and contained are true, as he is informed and believes, and to the best of his knowledge, information and belief.

W. B. MILLER.

Sworn to and subscribed before me this 9th day of May, 1911.

O. P. DARWIN, *N. P.*

To the C. & M. in Chancery at Chattanooga:

On the foregoing bill being filed, issue injunction as prayed, upon complainant giving bond therefor, conditioned as required by law, and in the sum of $2,000.00.

This May 10th, 1911, at 10 o'clock A. M.

SAM C. BROWN,
Judge 4th Judicial Circuit.

13 THE UNITED STATES OF AMERICA,
Southern District of Ohio,
Western Division, ss:

The President of the United States of America to the Marshall of the Southern District of Ohio, Greeting:

You are commanded to notify Dayton Coal & Iron Co. a corporation, defendant citizen of and resident in the State of Ohio, if it be found in your District, that it has been sued by the Cincinnati, New Orleans and Texas Pacific Railway Co., a corporation, Plaintiff, citizen and resident in the State of Ohio, In the United States Circuit Court, within and for the District and Division aforesaid, at Cincinnati, and that unless it answer by the 22nd day of April, 1911, the petition of the said Plaintiff against it filed in the Clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 3rd day of April, A. D. 1911.

Witness the Hon. Edward D. White, Chief Justice of the United States this 24th day of March, A. D. 1911, and in the 1235th year of the Independence of the United States of America.

Attest:

B. E. DILLEY, *Clerk,*
By HARRY F. RABE, *Deputy.*

EXHIBIT # 1.

Summons in action for money only, amount claimed $4933.08 with interest upon $263.21 from May 15, 1907; upon $399.01 from Jnue 15, 1907; upon $508.64 from July 15, 1907; upon $469.71 from Aug. 15, 1907; upon $1753.27 from Sept. 15, 1907; upon $20.09 from Oct. 15, 1907; upon $490.14 from Nov. 15, 1907; upon $420.73 from Dec. 15, 1907; upon $284.53 from Jan. 15,
14 1908; upon $236.87 from March 15, 1908; upon $447.02 from April 15, 1908; upon $30.48 from Sept. 15, 1908; upon $22.85 from Oct. 15, 1908; upon $17.73 from Jan'y 15, 1909, and $38.80 from June 15, 1909.

A true copy:

EUGENE L. LEWIS,
U. S. Marshall.

POOR COPY

Demurrer of N. C. & St. L. Ry. & W. & A. Rd. Co., Filed June 9, 1911.

The defendants the Nashville, Chattanooga & St. Louis Ry. and the Western & Atlantic Railroad Co. demur to the bill of complainat of the above named plaintiff, and for cause of demurrer show:

(1) That enither of these defendants is a proper party to this lawsuit as appears upon the face of the bill and have no interest in the subject matter of the suit.

(2) It is not shown in the bill that these def'ts or either of them are in any way liable to the compl't on account of the alleged overcharge described in the bill.

(3) Because it appears from the bill that these defendants are not in any manner interested in and are not parties to the suit of the Cincinnati Southern R'y against the compl't alleged to be pending in the U. S. Circuit Court at Cincinnati, and are not interested in the indebtedness sought to be recovered in said suit.

(4) Because these defendants are not parties to the alleged contract between the Cincinnati, Southern Ry. and this compl't with reference to the carriage of iron ore from Cartersville, Georgia to Dayton, Tennessee, at the price of 60 cents per ton of 2240 pounds.

(5) Because complainant is not entitled to any relief against these defendants and does not specially pray any.

Wherefore these defendants pray the judgment of the court, whether they must answer further and pray to be hence dismissed.

BROWN, SPURLOCK & BROWN.
Sol'rs for Def't.

15 Foregoing demurrer by consent of parties, is before the Chancellor at Chambers for action, and decree thereon. The Chancellor is of opinion and so decreed that said demurrer as a whole embracing all the grounds thereof, is not well taken, and the same is therefore overruled. Respondents are allowed 20 days to answer so as not to delay the hearing. this 31 Aug. 1911.

T. M. McCONNELL, *Chancellor.*

Decree, Enrolled Sept. 26", 1911.

No. 12597.

DAYTON COAL & IRON CO., LTD.,
vs.
C. N. O. & T. P. RY CO. et al.

Be it remembered this cause came on to be heard on June 15, 1911 on the entire record, the motion of the compl't to file and amendment to its bill and the motion of C. N. O. & T. P. Ry. Co. to dissolve the injunction heretofore granted herein, and also on the de-

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murrer interposed by its co-defendants from all of which the court is of opinion and decrees:

(1) That the motion of compl't to amend its bill as paryed be allowed and said amendment will be made as of June 15, 1911, filed as of that date, and no further or additional process respecting said amendment need issue; but the various process respecting said amendment need issue; but the various defendants will take notice thereof without further service or notice.

(2) That each and every of the 3 grounds of the motion to dissolve the injunction be and are hereby in all things sustained and the injunction heretofore granted and issued in this case is in all things dissolved. To this action, compl&t excepts.

(3) That the demurrer of the other def'ts be and the same is in all things overruled. And each and all the defendants have 20 days from this date in which to answer so as not to delay the hearing.

This cause was heard on June 15, 1911 by consent of parties as to all the matters above, and held under advisement until this date, and the order will be entered now as of the date of
16 hearing, except that the time to answer will date from the entry of this order.

T. M. McCONNELL, *Chancellor.*

Amendment to Original Bill, Filed September 26, 1911, *as of June* 15, 1911.

Application to Amend Bill.

To the Honorable T. M. McConnell, Chancellor, etc.:

Comes the Dayton Coal & Iron Company above, complainant, and shows,

(1) That neither of the defendants Western & Atlantic R. R. Co. nor Nashville, Chattanooga & St. Louis Railway has an office, agent or place of business in the City of Cincinnati, Ohio, or within the jurisdiction of the U. S. Circuit Court in and for Southern District, Western Division, State of Ohio? And neither of said defendants had an office, agency or place of business within said jurisdiction at the time the suit herein was filed, or at the time the suit enjoined herein was brought by C. N. O. & T. P. Railway Co.; neither has either of said two defendants had an office, agency or place of business or been within the jurisdiction of said United States Court, since the institution of the suit herein enjoined.

This statement is made as the result of a careful investigation and inquiry of the Cincinnati City Directory, the Telephone Directory and the Railway offices and connections in and for said City of Cincinnati and compl't hence charges on information and belief that the statements above made are true.

(2) Said two defendants are not only proper but necessary parties to a determination of the matters involved in this litigation and the complainant knows of no other jurisdiction wherein they

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can, with as little inconvenience to themselves, be brought before a court, having jurisdiction of the subject matter, as in Hamilton County, Tennessee.

17 Compl't did not know of the facts above at the time of preparing the original bill herein, which was somewhat hastily prepared and verified by the same counsel who submits this amendment, and there is attached hereto and asked to be made a part hereof, as Exhibit No. 1 but not for copy, the result of complainant's investigations at Cincinnati with respect to the residence or citizenship of N. C. & St. L. Ry. Co. and W. & A. R. R. Co. as aforesaid.

(3) Wherefore, compl't prays to be allowed to file this as an amendment to its original bill and that your Honor consider said amendment along with and as a part of the original bill in ruling on the motion to dissolve injunction and the demurrers heretofore filed; and for general relief.

MILLER & SWAFFORD,
Solicitors for Compl't.

STATE OF TENNESSEE,
Hamilton County:

W. B. Millerm being sworn, says he is counsel for complainant, and that the statements made in the foregoing proposed amendment to the original bill are true to the best of his knowledge, information and belief.

W. B. MILLER.

Sworn to and subscribed before me this June 15, 1911.
O. P. DARWIN, *N. P.* [SEAL.]

EXHIBIT No. 1.

Mr. W. B. Miller c/o Burkett, Miller & Moore, Chattanooga, Tenn.

DEAR SIR: Your letter of 12th inst. is received and contents noted. The writer called at the offices of the Pennsylvania R. R. the Southern Ry. L. & N. R. R. and Q. & C. R. R., all of whom answered that neither the N. C. & St. L. or the Western & Atlantic have

18 offices or agents in Cincinnati, and in every case, to be certain, they referred to the official Railway Guide, which makes no mention of any office or agent in this city. There is no record of any offices or agents in the Cincinnati directory or the telephone directory.

Yours very truly,

THE DAYTON COAL & IRON CO., LIMITED,
SAMUEL H. WHITAKERM,
Ass't to Managing Director.

COPY

Answer of C., N. O. & T. P. Ry. Company, Filed Oct. 25, 1911.

The Separate Answer of the Defendant Cincinnati, New Orleans and Texas Pacific Railway Company to the Original and Amended Bills filed in the Above-entitled Cause by The Dayton Coal & Iron Co., Ltd., Against this Respondent and Others in the Chancery Court at Chattanooga, Tennessee.

For answer to so much and such parts of said bills *are* as this respondent is advised it is material and necessary for it to respond to, respondent says:

(1) It is true that this respondent is a railroad corporation engaged in operating a line of railroad as hereinafter stated.

(2) Respondent admits that the complainant is and was at the times mentioned in the original bill, engaged in the manufacture of pig iron at Dayton, Tennessee, where its plant is located, and that it uses and consumes in its business large quantities of iron ore, a considerable portion of which is carried by this respondent as connecting carrier, for delivery to complainant at Dayton, Tenn. It is true that this respondent is, and during the period mentioned in the bill, has been, engaged in operating a line of railroad extending from Chattanooga, Tennessee, to Cincinnati, Ohio, and that Dayton, Tennessee, where the complainant's plant is located, as aforesaid, is a point on respondent's line, about 38 miles
19 northward from Chattanooga. This respondent is the lessee of said line of railroad, which is known as the Cincinnati Southern Railway, and which belongs to the city of Cincinnati, Ohio, through the Trustees of the Cincinnati Southern Railway, who were authorized to build said railway by various acts of the legislatures of the states of Ohio, Kentucky and Tennessee, the Tennessee Act being Chapter 42 of the Acts of 1869-70, page 291, which was passed and took effect Jan. 20 1870.

This respondent, operating said line of railway as lessee as aforesaid, from Chattanooga, in the State of Tennessee, through the state of Kentucky, to Cincinnati, in the State of Ohio, is and has been engaged in interstate commerce and like other carriers so engaged, was and is subject to the Act of Congress known as the Act to Regulate Commerce, and its amendments. Respondent's co-defendant, the N. C. & St. L. Railway, operating its own lines and the line of the W. & A. Railroad Co. is also engaged in Interstate commerce and subject to the provisions of said Act, but that fact is of no consequence in this litigation, and does not affect the controversy involved herein, for the reason that as to all the shipments involved in this litigation, the N. C. & St. L. Railway was the initial and originating carrier, and was the only company which had power or authority to establish and publish a through rate on the iron ore.

While it is true that this respondent exercised and held itself out as possessing the right to exercise the power and authority to make contracts respecting the carriage of freight, it denies that it possessed or assumed to possess or exercise, the power to make con-

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tracts concerning interstate traffic in violation of law, and if, as complainant in effect alleges, any such contract had been made, it would not be binding either upon the complainant, this respondent or any other person or corporation.

(3) For want of knowledge this respondent cannot answer the allegations concerning the purchase by complainant of iron ore at or near Cartersville, Ga.; and because complainant fails to
20 state the date of the alleged transaction, respondent cannot admit that complainants contracted for the transportation of such iron ore from Cartersville, Ga., to Dayton, Tenn., at the rate of 60 cts. per ton of 2240 pounds, if this allegation has reference to shipments of iron ore from Cartersville, Ga., to Dayton, Tennessee, made prior to that date was 60 cts. per gross ton; but if the allegation refers to shipments made after that date, respondent denies it.

Prior to the date mentioned, the established rate on iron ore from Cartersville, Ga. was 60 cts. per ton, as stated above of which the N. C. & St. L. Railway received 40 cts. for transporting the iron ore from Cartersville, Ga. to Chattanooga, Tenn., and this respondent received 20 cts. per ton for transporting it from Chattanooga to Dayton, Tenn. and upon application of the complainant, this respondent, early in the year 1906, did quote to complainant, a through rate of 60 cts. per gross ton, on iron ore shipped from Cartersville, Ga. to Dayton, Tenn., and this was the rate demanded of and collected from the complainant, payments being made to this respondent, and distributed as aforesaid. There was and could have been no misunderstanding or deception about the transaction, and this respondent specifically denies every allegation or insinuation that there was. There was no guaranty agreement or understanding that the rate should continue the same, and respondent had no authority to make any such agreement.

(4) For want of knowledge this respondent cannot answer the allegation that in the early part of the year 1907, complainant contemplated contracting for a large quantity of iron ore, and took certain steps in connection therewith. As already hereinbefore stated, if a rate of 60 cts. per ton was quoted for iron ore to be shipped from Cartersville, Ga. to Dayton, Tenn., prior to March 5, 1907, such quotation was correct, as already explained but if a rate of 60 cts. was quoted for transportation of iron ore between the points named after said date, such quotation was erroneous, and any understanding, agreement or contract that the ore should
21 be transported at that rate was contrary to law and void.

As authorized to do by the Act to Regulate Commerce, as the same existed during the period covered by this controversy being the Act as amended in 1906, to which this respondent and its co-defendant N. C. & St. L. Railway were alike subject, the said N. C. & St. L. Railway duly filed and published a schedule known as Tariff I. C. C. #1351A showing the joint rate for the through transportation of iron ore from Cartersville, Ga. and also from Emerson and Rogers Ga. to Dayton, Tennessee, to be 70 cts. per ton of 2240 pounds, based on the minimum weight of the capacity of the car,

COPY

or, if the car was actually weighed, 90% of the capacity of the car, and this tariff became effective on March 5 1907, and binding not only upon the N. C. & St. L. Railway and this respondent, but equally binding upon the complainant and any other shipper. This respondent was named as one of the parties to this joint tariff, and as required by the law, it filed with the Interstate Commerce Commission evidence of its concurrence therein and acceptance thereof, and it and its codefendants were prohibited by law from charging, demanding, receiving or collecting any greater or less or different compensation for the transportation of iron ore between the points named in said tariff, than the rate delivering carrier, was bound to collect such published tariff rate even if any contract*m* agreement or understanding to the contrary had existed. The increase on the rate from 60 cts. to 70 cts. did not increase the amount of compensation received by this respondent for the transportation of iron ore from Chattanooga to Dayton, but said compensation remained 20 cts. per ton, as before.

(5) It is true that after said through tariff of 70 cts. per gross ton went into effect on March 5, 1907, this respondent did bill to the complainant freight on oron ore shipped to Dayton from Cartersville Ga. and from Emerson and Rogers Ga. which were covered by said through tariff rate as
22 aforesaid, at the rate of 70 cts. per ton and insisted and still insists upon the payment of thar rate. The complainant had an arrangement by which it was permitted to settle its freight bills monthly and during the period covered by this controversey it made various deductions from its monthly freight bills, claiming that it was overcharged at the rate of 10 cts. per ton. These deductions amounted to a consideratble sum of money. From April 1907 to December 1908, the deductions amounted to $4639.49 and during the period from July 1907 to May 1909 other deductions were made amounting to $153.79.

During the period from May 1, 1907 to March 6 1908 the complainant delayed the loading of iron ore at Emerson and Cartersville, Ga. at various times, whereby car service accrued to a considerable amount. The amounts deducted by complainant, upon the ground that it had been charged too high a rate on shipments of iron ore were treated as over charge claims, complainant giving to respondent a receipt for the over-charges, as if the money had been paid by the compl't and then refunded, the receipt showing that if the N. C. & St. L. Ry. failed to agree to the deduction, the amount of that line's proportion should be charged back to the complainant, respondent made no agreement, and there was no understanding that t-e complainant should be released from liability, for these deductions, and respondent had no authority to make any such agreement. As already hereinbefore stated, the compl't was bound by the published tariff, and it was not within the power of the compl't and respondent to alter the same.

(6) It is true that respondent has frequently demanded of the complainant, settlement of the balance aforesaid. The account was repeatedly presented to the complainant, and payment was persist-

ently refused by it, until finally it was suggested that a friendly suit be brought to determine the rights of the parties. Accordingly this respondent did institute suit in the United States Circuit Court at Cincinnati, Ohio to recover the demands hereinbefore men-
23 tioned. After said suit had been brought, complainant, through one of its attorneys, represented to the att'y for this respondent, that it had no- had time to prepare its answer, and applied for an extension of time for that purpose, which was granted; but instead of filing an answer, on said cause pending in the United States Circuit Court at Cincinnati, the compl't brought the present injunction suit in this honorable court, said suit is still pending, undetermined, in said U. S. Circuit Court.

Respondent denies that the complainant has any valid defense against said suit, and denies that there is any question involved therein, which cannot be fully litigated in and determined by said U. S. Circuit Court. It denies that there are any equitable questions involved therein, or that the N. C. & St. L. Railway is either a necessary or a proper party.

(7) Respondent denies all the allegations of Paragraph VII of the original bill not hereinbefore admitted. It denies that this respondent made or had authority to make any contract for the through transportation of iron ore from Cartersville Ga. to Dayton Tenn. at a less rate than 70 cts. per gross ton after said tariff I. C. C. 1351A became effective, March 5, 1907. It denies that it held itself out as authorized to modify or change said through rate, or to charge a less rate than 70 cts. per ton. It denies that after the date mentioned there was any through rate of less than 70 cts. from Cartersville, Ga., and other nearby points, to Dayton, Tenn. The tariff of March 5, 1907, superceded all prior local and through tariffs on through shipments of iron ore from said point and became and was from that date the rate which the compl't was bound by law to pay and which this respondent was bound by law to collect. As already hereinbefore stated, the published schedule was full and legal notice to complainant, of the existing rate. It is probably true that at some earlier date the local rate had been 40 cts. per ton on ore shipped from Cartersville, Ga., to Chattanooga, Tenn., and the local rate charged and received by this respondent was 20
24 cts. and, as already stated, remains the same, after the establishment of the tariff. Even though the through rate established was higher than the sum of the local rates, respondent is advised that such rate was not necessarily unreasonable or excessive but if so, the only remedy which complainant had was to complain*ant* to the Interstate Commerce within the time allowed by law, which it has failed to do. Respondent denies that the compl't is entitled to any relief whatever against this respondent.

(8) Respondent denies all the allegations of Par. 8 of the original bill, not hereinbefore answered, admitted or denied. As already stated the rate of respondent's compensation for the transportation of said iron ore was not increased by said tariff of March 5, 1907, for the reaso- already hereinbefore stated.

(9) Respondent denies all the allegations of the amended bill not

hereinbefore answered, admitted or denied, and denies that the N. C. & St. L. Ry. Co. is a necessary or proper party to the settlement of the controversy involved in the suit pending in the U. S. Circuit Court at Cincinnati, Ohio.

And now having fully answered, respondent *parys* to be hence dismissed with reasonable costs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
By ROBERT PRITCHARD, *Sol'r.*

PRITCHARD & SIZER,
Solicitors for Respondent.

STATE OF OHIO,
County of Hamilton:

In verification of the foregoing answer the C. N. O. & T. P. Ry. Co. a corporation under the laws of the State of Ohio has caused its corporate name to be signed, and its corporate seal to be affixed, to this its answer, by its duly authorized officer, at its office in Cincinnati, Ohio on this the 24th day of October, 1911.

C., N. O. & T. P. RY. CO.,
By N. POWELL, *Vice Pres't.*

Attest:
A. TELFORD,
Assy. Secy. [SEAL.]

Answer of N., C. & St. L. Ry. & W. & A. Railroad Co., Filed October 28, 1911.

The Separate Answer of the Nashville, Chattanooga, & St. Louis Railway and the Western & Atlantic Railroad Co. to the Bill of Compl't Filed Against Them and Others in the Above-styled Cause.

(1) It is true that the Western & Atlantic Railroad Co. owns a line of railroad extending from Cartersville, Georgia, and other points in said State, to Chattanooga, Tennessee, and has owned and operated said line fo- the time stated; and that the Nashville, Chattanooga, & St. Louis Railway has operated said line for several years past and since prior to 1906 under a lease executed under an Act of the Legislature of the State of Georgia the terms of which are fully known to all well informed persons upon railroad matters in this vicinity. There has been no concealment about the said lease or the Act under which it was executed and the relations between the Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad Co. may be readily ascertained by anyone desiring to know the true facts. As is generally known, the said lessor company operates the said lessee company under the

act referred to as a corporation of the State of Georgia which is known as the Western & Atlantic Railroad Co.

(2) It is also true that the complainant is engaged in the manufacture of pig iron at Dayton, Tennessee, as alleged and that it is located at Dayton, Tenn. On the line of railroad operated by the Cincinnati, New Orleans & Texas Pacific Railway Co. It is
26 not, however, admitted that said railroad company has, during the time stated held itself out as having full power and authority to make contracts respecting shipments of freight, and to name through freight rates, or that it does possess such power to contract, as will be more fully hereinafter stated. Its limited authority in this respect is to promulgate tariff sheets binding upon itself and all shippers alike, and excluding its right and power to make special contracts with any of them.

(3) It may be true that the complainant did, as alleged in the third paragraph of its will, purchase or contract for the purchase of iron ore at Cartersville and other points in the State of Georgia, to be hauled and delivered from the State of Georgia to the yards of compl't at Dayton, Tennessee, but is is not true as these respondents are informed, that their co-defendant contracted with the compl't to deliver this iron ore at 60 cts. per ton of 2240 pounds as alleged.

These respondent- deny that the Cincinnati Southern Railway or any other railroad company had any authority or right whatever to represent them as agent or otherwise; in making a-y such contract with the complainant; or that said Cincinnati Southern Railway or any other railroad company was held out by the respondents as possessing the right to make such contract for them; or that the complainant did, without it was misinformed as to the law, act upon any such assumption. If the Cincinnati Southern Railway or the Cincinnati, New Orleans & Texas Pacific Ry. Co. did in fact (which respondents do not believe) assume to make a special contract with the compl't said railroad companies had no right whatever to act for these respondents and every allegation to this effect is denied.

For further answer to this paragraph of said bill, respondents aver that prior to the time stated, the Congress of the United States, had passed an act regulating interstate commerce, in which was de-
27 fined and declared every right possessed by interstate carriers of freight. Under this act, every such carrier was required to issue tariff sheets or rates covering all interstate shipments, including rates on shipments carried over several distinct lines. Joint freight tariff rates under this Act were issued by respondents in connection with the Cincinnati, New Orleans & Texas Pacific Railway Co. covering every shipment of iron ore from Cartersville and other points in Georgia to the compl't at Dayton, Tennessee, *covering every shipment of iron ore made from Cartersville and other points in Georgia to the compl't at Dayton, Tennessee,* covering the whole period alleged in complainant's bill. These rates were filed with and approved by the Interstate Commerce Commission. According to said tariff sheets, the through rate on iron ore from the points in Georgia to the complainant's plant was 60 cts. per ton

from sometime in 1906 up to the 7th day of March 1907 when a new joint freight tariff made by these respondents in connection with the Cincinnati, New Orleans and Texas Pacific Ry. Co. and other carriers became effective.

The last named tariff sheet was issued Feb. 2, 1907 filed with the Interstate Commerce Commission and as provided therein, the freight rate on iron ore from Bartow, Cartersville Emerson and Rogers all in the State of Georgia, to Dayton, Tennessee was 70 cts. per ton of 2240 pounds. Under the Act of Congress already referred to, respondents were authorized to make and publish said tariff rate and file the same, as it did, with the Interstate Commerce Commission, and when so made and filed under the said law it became the positive and absolute duty of respondents and other railroad companies, joining in said tariff, to charge the rate named therein. If either of them had charged either more or less than the designated rate, it would have been subject to heavy fines and penalties. Neither of said carriers had any right whatever to contract with the the complainant to deliver iron ore at any less rate than the published rate in force, at the time the shipment was made; and complt. itself, would have been subject to prosecution if it had knowingly contracted for a less rate and if it had, in fact, paid a less rate than that named, even though expressly contracted for. it could
28 have been compelled to pay the full rate provided for by the tariff sheet. Respondents, therefore, deny that any such contract as alleged in the 3rd paragraph of complainant's bill was or could have been made, or that either the complainant or respondents had any right to make such a contract, or that any such contract was in fact, attempted to be made.

It is true that the freight due upon each shipment or iron ore made to compl't was collectible at the point of delivery and that the same was pro rated among the several carriers interested therein, and this was all done under the law aforesaid, and could in no manner vary the legal rights of the parties, as declared and fixed by the Interstate Commerce Act.

(4) It may be true that about the beginning of 1907, compl't contemplated contracted for a large delivery of iron ore to be shipped to it from Cartersville and other nearby points in the State of Georgia, and over the lines of respondents but whether the compl't contracted for a large or small amount of iron ore would be immaterial, because it could not by such contract in any manner effect the legal obligations imposed upon all carriers by the act aforesaid, which was passed for the express purpose of preventing contracts giving preference to one shipper over others.

It may be true that the compl't at the beginning of the year 1907, was named a freight rate of 60 cts per ton, because up until March 7th of that year, that was the true rate from Cartersville, and other points in Georgia to Dayton, Tenn., for the carriage of iron ore, and had been the rate for some period of time prior to that date. As before stated, it is wholly immaterial whether or not complainant entered into a contract, for the purchase of ore, extending over a long period, and made for its own guidance a cost sheet in which

it figured a freight rate of 60 cts. per ton. Such a contract between the compl't and dealers in iron ore could confer no power upon the def't carriers to charge the compl't a less rate of freight than it charged to all other shippers.

29 (5) It is true that sometime after the beginning of 1907 that is on or after March 7th of that year, the ore shipments were billed to the compl't at 70 cts. per ton instead of 60 cts. per ton as had been previously charged and collected, because on the latter date, the new through tariff rate went into effect as already hereinbefore stated.

It is also true that the Cincinnati, Southern Ry. or the Cincinnati, New Orleans & Texas Pacific Ry. Co. the delivering carriers, collected the freight charges, but this was in accordance with the regular course of business as provided by the act referred to and the custom of all railway companies.

It is also true that the compl't did decline to pay the advanced tariff rate of 10 cts. per ton, as provided by the new tariff sheet and has continued to withhold the same up to the present time. The exact amount that is still due from it on this account is not known to these respondents. Respondents do not know whether or not it is true that the Southern Ry. was put on notice that compl't would not pay this balance, but avers that this statement is wholly immaterial as under the law, neither it nor the def't carriers have an option about the matter.

It is not true that the compl't was at the mercy of the def't carriers unless by the charge it is meant that the compl't was denied by law the right to receive shipments of iron ore at a less rate than that charged others. It would of course, be largely to complainant's advantage if it were conceded the right to make a long time contract for ore at a rate, which, so far as it was concerned, could not be varied by the carriers, though said carriers might, in accordance with the law, advance their rates as to all other shippers.

(6) It is true, as respondents are informed, that suit was instituted against the compl't as alleged in the 6th paragraph of its bill. The compl't having failed to pay the published tariff rate on the iron ore received by it, it became and was the duty of these respondents co-defendant-, to bring the said suit. Respondents deny that

30 the complainant has any valid defense against said suit unless the Act of Congress regulating interstate Commerce is void and of no effect.

(7)

(1) Respondents deny that there was or could have been any express contract controlling the rate of freight to be charged to the complt. or that the Cincinnati Southern Ry. was either expressly or by implication authorized in making such contract to act for these respondents.

(2) Respondents also deny that they are equitably estopped to deny the authority of said carrier, to act for them for reasons hereinbefore alleged.

(3) It is true that at and prior to the 7th day of March 1907 there was a through freight rate from Cartersville Ga. to Dayton,

Tenn., on iron ore of 60 cts. per ton effective from sometime in Dec. 1906, but they deny that this rate continued up to Feb'y or March 1909. On the contrary, they aver, as already hereinbefore shown, a new tariff rate was issued by respondents in connection with their co-defendants which was filed with the Interstate Commerce Commission and this tariff provided for a rate of 70 cts. per ton on such shipments from and after March 7, 1907. This latter tariff was binding upon these respondents and also their co-defendant.

(4) It may be true during the period of said controversey there was a local rate from Cartersville and other points in Georgia to Chattanooga, Tenn. of 40 cents per ton; and also a local rate of 20 cts. per ton from Chattanooga, to Dayton, Tenn. but such local rates had no reference whatever to complainant's shipments. Whatever local rates were in force at said time, were issued by these respondents and their co-defendant severally and were filed with the Interstate Commerce Commission as required by law. It applied only to local shipments made by said carriers separately, and not to through shipments made by them jointly.

31 Whether or not either the through joint rate of the several carriers or their local rates were unreasonable or discriminated in any manner against the complainant, is a question that would be entirely within the jurisdiction of the Interstate Commerce Commission and could not be regulated by this or any other court. If said rates were either unreasonable in themselves or discriminated against the complainant, *he* had under the Act to regulate commerce already referred to, a right to make complaint to said Interstate Commerce Commission and this right was exclusive of all other remedies on this question.

(5) It may be true that on January 26, 1907, there was a posted rate sheet in the office of the Railway Co. at Dayton, Tennessee, of 60 cts. per ton of 2240 pounds on iron Ore from Cartersville, Ga. in connection with these respondents as that was the published rate at that time. As to this averment of fact, however, these respondents have no knowledge whatever.

(8) Respondents made and published the tariff rates as hereinbefore stated in connection with the Cincinnati, New Orleans & Texas Pacific Ry. Co. The fact of making and publishing these tariff rates and the connection of the several carriers therewith have never been denied, by either of them. These tariff sheets were made and filed with the Interstate Commerce Commission, and posted, and every shipper has had full and ample opportunity to inform himself concerning them. They could not be a subject matter of insinuation by anyone wishing to state the plain and simple truth.

Respondents are at a loss to understand the charge made in paragraph eight of complainant's bill that they are acting in collusion for the express purpose of defrauding the said complainant. As already stated, the relation between these respondents is founded on a public law, of the State of Georgia. It is common and general knowledge that the relations between these two companies are prescribed by this law. The relations between the two are matters of notoriety and have been frequently the subject of newspaper pub-

lications. The Nashville, Chattanooga & St. Louis Ry. is the lessee of the line of railroad leading from the city of Chattanooga
32 to Atlanta and which belongs to the State of Georgia. Under the Act authorizing this lease the said line of railroad is operated by the Nashville, Chattanooga & St. Louis Railway as a corporation under the laws of Georgia by the name of the Western & Atlantic Railroad Co. If there is any collusion due to this relationship, it is chargeable to the Legislature of the State of Georgia, as the compl't must have known unless seeking for some charge upon which to obtain a standing in this court of equity.

Respondents further aver that it is wholly immaterial to the rights of compl't as to what manner of accounts are kept between def'ts and as to when and how settlements are made between them. As a matter of fact, however, settlements between said carriers are made weekly.

Complainants deny that the Cincinnati Southern Ry. or the Cincinnati, New Orleans & Texas Pacific Ry. Co. makes no claim against compl't except that it has paid or will be called upon to pay the additional 10% to these respondents. As already stated, said railroad company is acting under obligations prescribed by the act regulating commerce which compels it to collect the full and true amount of freight from every shipper to which it makes deliveries.

(9) For further defense, respondents aver that in making and charging the freight rate complained of, and that their co-def't in its effort to collect said freight rate, they have acted under their rights and duties as prescribed by the act to regulate interstate commerce and neither of them has had any relations whatever with the complainant, except as prescribed and regulated by that law. They have charged the compl't the same rate they charged to all other shippers. They again deny that they either have or could have made any special contract with the complainant by which they have obligated themselves either to prefer the compl't over others or to deny to it the rights given to all others under the published tariff rates.

And now having fully answered, they pray to be hence
33 dismissed.

N., C. & ST. L. RY.
WESTERN & ATLANTIC R. R.
By BROWN & SPURLOCK, *Att'ys.*

Certificate waived.

Deposition of Robert Thompson. Filed April 10, 1912.

The Deposition of Robert Thompson, Taken by Consent of Parties on Behalf of the Complainant on March 29, 1912, in the Presence of Solicitors for all Parties.

Said witness ROBERT THOMPSON, being duly sworn, deposed as follows:

Direct examination:

By Mr. MILLER:

I suppose the corporate existence of the compl't is admitted.

By SOLICITORS FOR DEFENDANT:

Yes sir.

By Mr. MILLER:

1. How old are you Mr. Thompson?
A. 31 years old.
2. What is your relation to the compl't Dayton Coal & Iron Co. Limited?
A. Cashier.
3. Where is the Dayton Coal & Iron Co.'s operating office located?
A. At Dayton, Tennessee.
4. State whether or not the compl't company was engaged in the manufacture of pig iron in the years 1906 and continuously subsequent to that time?
A. They were.
5. Where did they procure its raw material if you know? I mean its ore supply for the years 1907-8-9 if from more than one point, tell what points?
34 A. Part of the ore was from Rockwood, that was the hard ore and part was from Roane Ore Mines, a few miles from Rockwood, and the balance consisting of brown *Memitite* ore was from the south, mainly from Tecumseh, Rogers, Emerson and Cartersville.
6. Are these points all in Georgia and Alabama—I mean Tecumseh, Cartersville, Emerson and Rogers?
A. Cartersville, Emerson and Rogers are in Georgia I believe and Tecumseh I think, in Alabama.
7. Now, I will ask you to state if you were acquainted during the year 1907, while you resided at Dayton Tennessee and in the employ of the company, with one H. H. Taylor, who was then the local agent at Dayton for the Cincinnati, New Orleans & Texas Pacific Ry. Co.?
A. I knew Mr. Taylor, yes sir.
8. Are you or not acquainted with his handwriting, that is, his signature?
A. I could recognize his signature.

9. During the year 1907, beginning with March or April, state whether or not Mr. Taylor was the local agent at Dayton Tennessee?

A. Yes sir, he was agent.

10. If the complainant company had any correspondence with Mr. Taylor about that time, respecting the rates on ore which it proposed to purchase from Cartersville, Ga. delivered to Dayton, Tenn. I will ask you to state if such correspondence were produced to you, you would recognize it, I mean the original correspondence?

A. I believe I could.

11. I pass you a letter purporting to be signed by Mr. Taylor as agent at Dayton, dated April 19, 1907, reading as follows:

"Dayton Coal & Iron Co., City.

GENTLEMEN: Your letter of the 2nd inst. R 196 on file this office. quotes present rate 60 cts. per cwt. ore Cartersville Ga. to Day-
35 ton, Tennessee.

Yours truly,

H. H. TAYLOR, *Agent.*"

State whether or not the signature is in the genuine handwriting of Mr. Taylor?

A. Yes sir, that is his signature.

12. Please file that letter as Ex. #1 to your deposition?

A. I do so.

13. In connection with that letter I will ask you if there came into your office attached to it a letter purported to be written by Mr. H. A. Poveleite, General Freight agent of the def't C. N. O. & T. P. Ry. Co. and if you have that letter. If so, give the date of it and file it as exhibit No. 2 to your deposition.

A. I don't know how this letter came into the office, I have seen it.

14. What is the date of it.

A. April 18th, 1907.

15. File it as exhibit No. 2 please.

A. I do so.

16. Have you or not seen enough of Mr. Poveleite's signature to say whether or not that is genuine?

A. No I have not.

17. State if you have the tariff R-196 referred to in Mr. Taylor's letter, and also in Ex. #2 to your deposition, and if you say you have, please file it as exhibit No. 3 to your deposition.

A. Yes, sir, we had this in our office and I file it as ex. No. 3 to my deposition as requested.

18. By whom was this tariff furnished?

A. I presume it was furnished by Mr. Taylor, it came into the office of the Dayton Coal & Iron Co. before I took charge as Cashier.

19. Was it the custom for H. H. Taylor to furnish tariff sheets of that kind quoting rates on freight?

A. When asked to do so by us, it was. He was the one we applied to for information on rates.

36 20. And if the agent at Dayton was not prepared to quote a rate, what did he do in ordinary course?

A. He applied to Cincinnati to the freight agent.

21. Of the C. N. O. & T. P. Ry. Company?

A. Yes sir, and then when he got the information he turned it over to us.

22. Now what, if you know, does the controversy between the defendant Railroad Co. in this case and the Dayton Coal & Iron Co. result from? What is the matter in controversy?

A. Difference of 10 cts. per cwt. in the rate of freight from Cartersville and Emerson, which the R. R. Co. overcharged the Dayton Coal & Iron Co. and which amount was deducted by the Dayton Coal & Iron Company.

23. I pass you a letter dated April 25, 1907, addressed to the Dayton Coal & Iron Co. and signed by H. H. Taylor, agent, purporting to quote a rate on ore from Emerson, Ga. to Dayton, Tenn. and ask you if that is Mr. Taylor's genuine signature to that letter and if so, file it as Ex. #4 to your deposition?

A. Yes sir, that is Mr. Taylor's signature and I file it as requested.

24. As I understand, the Dayton Coal & Iron Co. makes settlement on a basis of 60 cts. as shown in these two letters of Mr. Taylor's which you have filed?

A. Yes sir, they did.

25. This controversy results because an additional ten cents per ton is demanded by the C. N. O. & T. P. Ry. Co. and its co-def't?

A. Yes sir, that is so.

26. From what period did these shipments extend, about which the controversy arises?

A. From April 1907 I don't remember when they ceased, but along about the end of 1908, I believe, I am not sure when they stopped.

27. Do you remember whether they ceases before April 1909?

A. Yes sir.

Cross-examination.

37 By Mr. PRITCHARD, representing the C., N. O. & T. P. Ry.:

1. The letter- to which you have referred and which you have filed as exhibits to your deposition are letters which were found among the files of your Co.?

A. Yes sir.

2. You have stated that you know the signature of H. H. Taylor who waa the local agent at Dayton?

A. Yes sir.

3. Do you know anything about the extent of his authority with respect to quoting and making freight rates?

A. I only know when we wanted information on rates we would ask him and if he didn't have it, he applied to his superiors, and got the information and gave it to us.

4. That is you supposed he did inquire of his superiors but you don't personally know?

POOR C

A. I don't know, I didn't consider it was our business to know where he got it, but we applied to him.

5. The letters to which you refer are quotations which he made you?

A. Yes sir.

6. You do not undertake to say that the letters signed by H. H. Poveleite, is signed by Mr. Poveleite?

A. No sir, I don't know.

7. You don't know his signature?

A. I don't know his signature.

8. I hand you now a printed paper entitled "Rate issue No. 28137 Joint Freight Tariff of the Nashville, Chattanooga & St. Louis Ry. in connection with Cincinnati, New Orleans &Texas Pacific Ry. Co. and other railroads mentioned, which purports to cover iron ore shipments, and to be "Iron Ore Tariff No. 8" and ask you to identify that paper and file as Exhibit No. 5 to your deposition?

A. I don't remember seeing the paper before but I file it as exhibit #5 to my deposition as requested.

9. State whether or not that paper shows the freights
38 rates on iron ore from Emerson, Rogers and Cartersville to Dayton to be 70 cts. per ton of 2,240 pounds.

A. Yes sir, it does.

10. I will ask you to look at the first page of the paper shown you and state whether or not it shows that it is effective March 5th as printed and March 7th according to pencil correction 1907?

A. March 5th is printed, and March 7th is written with pencil.

11. State whether or not all shipments about which there is any controversy were subsequent to March 7th 1907?

A. I believe they were. I think they started About April.

12. In other words, the controversy between your company, the Dayton Coal & Iron Co. and the def't is that ten cents per ton too much freight was charged after March 7th, 1907?

A. Yes sir.

13. State whether or not the bills rendered for freight by the Cincinnati, New Orleans & Texas Pacific R'y Co. after that date, are for 70 cents and whether that is the rate upon which it is insisting?

A. Yes sir.

14. Do you know that as a matter of fact before this suit was instituted, suit had been brought for those freights alleged to have been arrears in the Circuit Court of the United States at Cincinnati, against the Dayton Coal & Iron Co.?

A. I had heard a rumor that suit had been brought but it had never been brought to my attention any other way.

Cross-examination:

By Mr. BROWN, representing the Western & Atlantic and the Nashville, Chattanooga & St. Louis Railway Companies:

1. Cartersville and Emerson are in Georgia and on the Western & Atlantic or Nashville, Chattanooga & St. Louis Railroad?

R COPY

A. I don't know which road they are on.

2. You never had any correspondence with the N. C. & St. L. railroad in reference to these shipments and rates?

39 A. No sir.

3. All these shipments were of course, interstate shipments?

A. Yes sir.

4. The N. C. & St. L. Railroad and the W. & A. railroad have never demanded anything of the Dayton Coal & Iron Co.?

A. No sir.

Redirect examination.

By Mr. MILLER:

1. State if the Cincinnati, New Orleans & Texas Pacific R'y Co. predicated its demands for this increase of ten cents on its liability to the W. & A. or Nashville, Chattanooga & St. Louis Railroad?

By Mr. BROWN: We object to that question as leading.

Exception overruled, appeal prayed and granted *to* the Chancellor.

A. Yes sir, they did.

2. Now, this exhibit #5 presented to you by counsel for C. N. O. & T. P. Ry. Co. I will ask you if such a rate sheet as that was ever seen by you before to your recollection?

A. I don't remember seeing that sheet before at all.

3. Was there anyone else engaged in the manufacture of pig iron at Dayton, Tennessee, during this period in controversy, or has there ever been to your knowledge except the Dayton, Coal & Iron Co. Limited?

A. There has been no one that I know except the Dayton Coal & Iron Co. limited.

4. Was it possible from an economical standpoint, for the Dayton Coal & Iron Co. to obtain ore from Cartersville, Ga except by way of delivery from the C. N. O. & T. P. Railway Co. during this period in controversy?

A. No other way for the ore to be brought to Dayton economically.

5. Could pig iron be manufactured from ore brought there otherwise than over the C. N. O. & T. P. Railway and connecting lines so as to compete in the market with other pi*f* iron pro-

40 ducers?

A. No sir it could not.

6. I show you what purports to be copies of 8 communications which I will ask you to file as Exhibits 6, 7, 8, 9, 10, 11 and 12 and 13 to your deposition, and state if you have seen the original of any of this correspondence, and if so, according to your best recollection, under what circumstances?

A. I don't remember to have seen the originals of them if I did see them, I don't remember where they were; I file them as requested.

7. Now state whether or not those purported copies which you

POOR C

have filed were made in your office or in the office of compl't Dayton Coal & Iron Co. limited, at Dayton, Tennessee?

A. I believe they were made in our office at Dayton, Tennessee? I douldn't be positive.

8. State the circumstances under which they were made, if you know and from what they were made?

A. I don't know from where the copies were gotten.

9. Will you examine the files in your office in Dayton, Tenn. and if you have the originals, of those letters, send them to the stenographer, to be attached as exhibits, and numbered consecutively, commencing with No. 14?

A. I will.

Recross-examination:

By Mr. BROWN:

1. You don't know anything about the division of rates between the railroad companies on these shipments, do you?

A. Except what I see. We paid the total freight as shown when the expense bills were presented to us.

2. You don't know how much the C. N. O. & T. P. Ry. Co. paid to the N. C. & St. L. Railroad Co. or how much they are going to pay?

A. No sir, I don't know how much they paid.

Further this dependent saith not.

41

Sworn to before me this 29th day of March, 1912.

——— ———, *N. P.*

EXHIBIT #1.

DAYTON, TENN., April 19, 1907.

Dayton Coal & Iron Co. City.

GENTLEMEN: Your letter of the 2nd inst. R. 196 on file this office. Quotes present rate 60 cts. per cwt. Ore. Cartersville, Ga. to Dayton, Tenn.

Yours truly,

H. H. TAYLOR, *Agent.*

EXHIBIT #2.

CINCINNATI, April 18th, 1907.

Rate 244-M2 Sp 3

Iron Ore, Cartersville, Ga., to Dayton, Tenn.

Mr. H. H. Taylor, Agent, Dayton, Tenn.

DEAR SIR: Returning herewith letter from the Dayton Coal & Iron Co. relative to the above subject. Present rate on iron ore carload is published in R-196.

Yours truly,

K. H. A. POVELEITE, *G. F. A.*

R COPY

41a

Form 500½.

C. N. O. & T. P. Ry. No. R-196. Coal Rate Sheet 3242.
I. C. C. No. 3269.

Supersedes.

Issues Shown on Last Page.

Cincinnati New, Orleans & Texas Pacific Ry. Company
in Connection with

Alabama Great Southern R. R.,
Harriman & Northeastern R. R.,
Kentucky & Tennessee R. R.,
Louisville & Nashville R. R.,
Norfolk & Western Ry.,
Southern Railway,

Western & Atlantic R. R.

Rates of Freight
to
C. N. O. & T. P. Ry. Station, viz:
Dayton, Tenn.,
on
Raw Material.

(For Use in Pig Iron Furnaces Only.)

(Reissue.)

Effective January 26, 1907.
Issued Jan. 26, 1907. By H. A. Poveleite, G. F. A.,
Cincinnati, Ohio.

Case 10.
Filed
Rate 244 S P 2-M. Reference
Ex. List: ICC Aud 5 WCS3 Dayton 3 Agts named 3 HJct3 TMR3
GFH3 ES3 (165) at

POOR C

41*b*

Rates of Freight
to
Dayton, Tenn.,
on
Raw Material.

Commodity.	From.	Rate.
Cinders, Mill, C. D/ Minimum weiht/t marked capacity of car.	Chattanooga, Tenn. (C. N. O. & T. P. Tracks.) Harriman, Tenn. Harriman Jct., Tenn.	30 " Per ton 2240 pounds, 20 cents.
Coal, C. L. (For cooking purposes see note 1.)	Lexington, Ky.	Per ton 2000 pounds 80 cents
	C. N. O. & T. P. Ry. Mines, viz:	Old rates.
	Alpine, Ky.	45 cents " 45
	Bryants, Ky.	42½ " 42½
	Cumberland Falls, Ky.	45 " 45
	Daisy, Tenn.	17½ " 17½
	Emory Gap, Tenn.	25 " 25
	Evensville, Tenn.	12½ " 12½
	Flat Rock, Ky.	45 " 45
	Glen Mary, Tenn.	35 " 35
	Graysville, Tenn.	12½ " 12½
	Greenwood, Ky.	45 " 45
	Helenwood, Tenn.	37½ " 37½
	Huffman's, Tenn.	35 " 35
	Indian Head, Ky.	45 " 45
	Isham, Tenn.	40 " 40
	Montlake Switch, Tenn.	20 " 20
	Oakdale, Tenn.	27½ " 27½
	Oneida (C. S. Tracks), Tenn.	37½ " 37½
	Pine Knot, Ky.	42½ " 42½
	Rathburn, Tenn.	17½ " 17½
	Robbins, Tenn.	35 " 35
	Sale Creek, Tenn.	12½ " 12½
	Silerville, Ky.	42½ " 42½
	Spring City, Tenn.	17½ " 17½
	Stearns, Ky.	40 "
	Wiborg, Ky.	45 " 45
	William's Siding, Ky.	45 " 45
	Winfield, Tenn.	40 " 40
	K. & T. R. R. Mines, viz:	
	Barthell, Ky.	47½ "

Does not include Belt Line Switching at Harriman, Tenn.

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Commodity	From	Rate
		Per ton 2000 pounds
Coal, Slack or run of mine, C. L. (for coking purposes).	H. & N. R. R. Mines, viz:	H. & N. E..14.6
Minimum Weight, 20 tons	Petros, Tenn.	C.N.O.&T.P.20.4
		Total ....35 cents
	Chattanooga, Tenn.,	Per ton 2000 pounds
Coal, Slack, C. L. (for coking purposes)	when from beyond	25 cents.
Coal, Slack, C. L.	C. N. O. & T. P. Ry. Mines, viz:	Per ton 2000 pounds
(See note 1.)	Alpine, Ky.	50 cents
		Per ton 2000 pounds
		L. & N.....10
Coal, Slack, C. L.	L. & N. R. R. Mines, viz:	So. Ry. to Har.
Minimum Weight, marked capacity of car	Middlesboro, Ky.	Jct. 65
		C. N. O. & T. P..20
		Total .....95¢
66		
Coal, Steam.	C. N. O. & T. P. Ry. Mines, viz:	Per ton 2000 pounds
(See note 1.)	Oakdale, Tenn.	40 cents
	Chattanooga, Tenn.	Per ton 2000 pounds
	(C. N. O. & T. P. Ry. Tracks)	25 cents
	C. N. O. & T. P. Ry. Ovens, viz:	
	Glen Mary, Tenn.	45
	Graysville, Tenn.	15
	Rathburn, Tenn.	25
	Sale Creek, Tenn.	15

	H. & N. E. R. R. Ovens, viz:	Per ton 2000 pounds
	Petros, Tenn.	H. & N. E. R. R. 17.7
		C.N.O.& T.P.22.3
		Total ....40 cents
Coke, C. L. (See note 1.)		Per ton 2000 pounds
		L. & N. 10
	L. & N. R. R. Ovens, viz:	So. Ry. to Har.
	Middlesboro, Ky/	Jct. 70
		C.N.O.& T.P.... 25
		Total 1.05
	Southern Ry. Ovens, viz: (Nashville Division)	Per ton 2000 pounds
	Waldensia, Tenn	Sou. Ry.....25
		C. N. O. & T. P.26½
		Total 51½
	L. & N. R. R. Ovens, viz: Via Cumberland Gap:	
	Appalchia, Va	Per ton 2000 pounds
	Big Stone Gap, Va	L. & N. 50
Coke, C. L.	Blackwood, Va	So. Ry. to
Minimum weight, 15 tons	Dorchester Jct., Va	Har. Jct... 60
	Intermont, Va	C. N. O. &
	Josephine, Va	T. P..... 22½
	Norton, Va	
	Via Middlesboro:	Total 1.32½
	Pineville, Va	
	Wallsend, Va	

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VERTICAL IN BOOK

Commodity	From	Rate
		Per ton 2000 pounds
	N. & W. Ry. Ovens, viz:	To Har. Jct...1.55
Coke, C. L.	Pocahontas and Tug River Dis-	C. N. O. & T. P. .30
Minimum, 24,000 Pounds.	tricts.	
(See note 1.)	(For List see last page.)	1.85
		Reissue of N. & W. Ry., I. C. C. 2003 B, June 7, '04.
Lime Rock, C. L.	Chattanooga, Tenn.	Per ton 2240 pounds
Minimum weight, 20 tons	(C. N. O. & T. P. Ry Tracks.)	20 cents.
	C. N. O. & T. P. Ry. Stations, viz:	
Limestone, C. L.		Per ton 2240 pounds
Minimum weight, 40,000 pounds	Daisy, Tenn	15 cents.
	Chattanooga, Tenn. (C. N. O. & T. P. Tracks.)	Per ton 2240 pounds 20 cents.
	C. N. O. & T. P. Ry. Mines, viz:	
	Cardiff, Tenn	
	Carters, Tenn	
	Chamberlaine, Tenn	20 cents.
Ore, C. L.	Emory Gap, Tenn	
Minimum weight, marked capacity of car	Pyott, Tenn	
	Tarwater, Tenn	
	H. & N. E. R. R. Mines, viz:	Per ton 2240 pounds
	DeArmond, Tenn	H. & N. E.....20
	Webster, Tenn	C.N.O.& T.P...27½
		Total 47½

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	Cartersville, Ga.....	Per ton 2240 pounds W. & A. R. R....40 C.N.O.& T.P.Ry..20 — Total 60
Ore, Iron, C. L. Minimum weight, marked capacity of car.....	A. G. S R. R. Mines, viz: Ft. Payne, Ala.....	Per ton 2240 pounds A. G. S. .....35 C.N.O.& T.P.Ry..20 — Total 55
	C. N. O. & T. P. Ry. Mines, viz: Lorraine, Tenn..... Roddy, Tenn.....	Per ton 2240 pounds 20 cents.
Ore, Iron, C. L. (See note 2.).....	Southern Ry., (Birmingham Division.) Mines, viz: Spring Garden, Ala..... Tecumseh, Ala.....	Per ton 2240 pounds To Chatta. .....40 C. N. O. & T. P...20 — Total 60
Sand, C. L. Minimum weight, 20 tons.....	C. N. O. & T. P. Ry. Stations, viz: Oakdale, Tenn.....	Per ton 2000 pounds 25 cents
Sand, C. L. Minimum weight, 20 tons.....	C. N. O. & T. P. Ry. Stations, viz: Spring City, Tenn.....	Per ton 2240 pounds 17½ cents

Appelies from C. N. O. & T. P. Ry. Tracks at Chattanooga, Tenn.

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NOTE 1.—Cars must in all cases be loaded to their visible capacity. When this is done the actual weight will be charged for if it is less than the stenciled capacity weight. The stenciled capacity weight must be used. Whenever it is impossible to ascertain scale weights.

NOTE 2.—Actual weight to be charged for with a minimum weight of 20 gross tons. In the absence of scale weights the marked capacity of the car will be charged for. Agents should insist on care being loaded to their marked capacity.

List of N. & W. Ry. Ovens.

Pocahontas District.

Pocahontas ..... Va.	Hiawatha ... W. Va.	Landgraff .... W. Va.
Cooper ..... W. Va.	Springton ... " "	East Vivian ... " "
Bramwell ..... " "	Wenonah ... " "	Vivian ..... " "
Simmons ..... " "	Coaldale ..... " "	West Vivian... " "
Osage ..... " "	Mayberry .... " "	Bigfour ..... " "
Goodwill ..... " "	Ennis ..... " "	Huger ..... " "
Duhring ..... " "	Elkhorn ..... " "	Welch ..... " "
Montcalm .... " "	Powhatan .... " "	Jed ..... " "
Hora ..... " "	Kyle ..... " "	Wilcoe ..... " "
Rock ..... " "	North Fork .. " "	Marburg ..... " "
Matonka ..... " "	Douglas ..... " "	Gary ..... " "
Weyaucke .... " "	Ashland ..... " "	Pageton ..... " "
Smokeless .... " "	Keystone .... " "	Perryville .... " "
Sylvia ..... " "	Eckman ..... " "	Berwind ..... " "

Tug River District.

Hemphill .... W. Va.	Marytown ... W. Va.	Vaughan Coal & Coke
Antler Coal & Coke	Twin Branch Mining	Co.'s Siding. W. Va.
Co.'s Siding. W. Va.	Co.'s Siding. W. Va.	Roderfield .... W. Va.
Short Cr. Coal Co.'s	Claren ..... " "	Iaeger ..... W. Va.
Siding ..... W. Va.	Big Sandy Coal	Coalwood ..... W. Va.
Davy ..... W. Va.	& Coke Co's	
	Siding ..... W. Va.	

This issue Supersedes:

Coal Rate Sheet	2640,	I. C. C. 2434, January 23, 1904.
" " "	2726	April 23, 1904.
" " "	2982	Supt. 3 to I. C. C. 2434, Aug. 8, 1905.
" " "	2987	August 15, 1905.
" " "	3179	October 5, 1906.
" " "	3210	November 23, 1906.
" " "	3216	December 6, 1906.
"	G 11756	Jan. 23, 1904.
"	12936	December 7, 1904.
"	13285	April 1, 1905.
"	13311	April 8, 1905.
"	14438	March 2, 1906.
"	15056	September 8, 1906.

VERTICAL IN BOOK

42 EXHIBIT #3 (Tariff sheets).

43 EXHIBIT #4.

DAYTON, TENNESSEE, April 25th, 1907.

Dayton Coal & Iron Co., City.

GENTLEMEN: Refer to your memo 22nd inst. Rate on ore Emerson, Ga., to Dayton, Tennessee.

Rate 244-M2 Sub pad 3. H. A. P. 25th inst.

Iron Ore carloads minimum marked capacity *marked capacity* of car rate made to Chattanooga 40 cts. via W. & E. R. R. from Chattanooga (C. N. O. & T. P. tracks) 20 cts. per gross ton, advise if rate will be used.

Yours truly,

H. H. TAYLOR, *Agent.*

Case #10.

43*a* Rate Issue No. 28137. Supersedes Rate issues No. 27056/27661/27682

I. C. C. No. 1351-A. Supersedes I. C. C. No. 1344-A & Amendments #2 and 3.

Joint Tariff (Freight)
of the
Nashville, Chattanooga & St. Louis Railway

in connection with

Alabama Great Southern RR.
Cincinnati, New Orleans, Texas, Pac. Ry.
Southern Ry.
Louisville & Nashville
Seaboard Air Line Ry.

Publishing Rates on

Iron Ore, C. L.
(Per ton of 2240 pounds.)

Iron Ore Tariff No. 8.

from

Miscellaneous Points
to
Points shown herein.

The traffic officials of lines made party hereto will certify to the Interstate Commerce Commission their concurrence in the rates published herein.

Issued February 2, 1907.
By Charles Barham,
General Freight Agent,
Nashville, Tenn.

Effective March 7, 1907.
Approved:
H. F. Smith,
Traffic Manager.

Nashville, Chattanooga & St. Louis Ry. Iron Ore Tariff No. 8. Per Ton, 2,240 Pounds.

Iron Ore, C. L. Minimum Weight (See Note 1) Except Where Otherwise Specified.

From / To	Alabama City, Ala.	Birmingham, Ala. Bessemer, Ala. Ensley, Ala.	Chattanooga, Tenn.	Clarksville, Tenn.	Cumberland Furnace, Tenn.	Dayton, Tenn.	Embreeville, Tenn.	Gadsden, Ala.	Goodrich, Tenn.	Harriman, Tenn.	Irondton, Ala.	Knoxville, Tenn.	La Follette, Tenn.	Middleboro, Ky.	Rising Farm, Ga.	Rockdale, Tenn.	Rock Run, Ala.	Round Mtn., Ala.	St. Pittsby, Tenn.	Tallapoosa, Ga.	Trussville, Ala.
Allens Creek, Tenn	....	....	....	*g*50	....	....	....	....	*e*36	....	....	....	....	....	....	....	....	....	....	....	....
Bartow, Ga	90	*a*90	....	....	....	70	125	80	....	90	105	105	100	105	65	125	70	75	....	80	110
Cartersville, Ga	90	*a*90	....	....	....	70	125	80	....	90	105	105	100	105	65	125	70	75	....	80	110
Chattanooga (when from beyond)	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	35	....	....
Emerson, Ga	90	*a*90	....	....	....	70	125	80	....	90	105	105	100	105	65	125	70	75	....	80	110
Fort Payne, Ala	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	*b*70	....	....
Fossil, Ala	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	92½	....	....
Gains Mill, Ga	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	80	....
Jenifer, Ala	....	....	*c*60	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Keener, Ala	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	75	....	....
Kimmins, Tenn	....	....	....	....	....	....	....	....	*e*25	....	....	....	....	....	....	....	....	....	....	....	....
Loogusta, Ala	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	92½	....	....
L. & N. R. R. Birmingham Mineral Division Station	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	*f*137	....	....
Lyle, Tenn	....	....	....	50	....	....	....	....	*e*25	....	....	....	....	....	....	....	....	....	....	....	....
Nixons Switch, Ala	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	*c*62½	....	....
Nunnelley, Tenn	....	....	....	60	*g*50	....	....	....	*e*15	....	....	....	....	....	....	....	....	....	....	....	....
Readers, Ala	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	92½	....	....
Riverside, Tenn	....	....	....	....	*g*50	....	....	....	*e*35	....	....	....	....	....	....	....	....	....	....	....	....
Rogan, Ala	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	70	....	....
Rogers, Ga	90	*a*90	....	....	....	70	125	80	....	....	....	....	....	....	....	....	....	....	....	80	110
Smythe, Ala	....	....	....	....	....	....	....	....	*e*	....	....	....	....	....	....	....	....	....	92½	....	....
Spring Creek Spur (running out from Bates, 2 miles south of Lyle, Tenn	....	....	....	50	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Suplgua Springs, Ala	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	70	....	....
Talladega, Ala	....	....	*c*60	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Wares, Ala	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	92½	....	....

a To Bessemer and Birmingham, Ala., via Chatt. & A. G. S. R. R., 1.10 per ton 2,240 ℔. *b* Carload minimum weight, 15 tons. *c* C. L. minimum weight, 40,000 pounds. *e* C. L. minimum weight, 40,000 lbs. when loaded in cars, series 1900, to 3,200 when loaded in cars of other series, capacity of car, but not to exceed 60,000 pounds. *f* C. L. minimum weight, 12 tons. *g* Cars to be loaded to their full capacity, provided this will not result in their being loaded in excess of 10 per cent above their marked capacity nor the total weight of car and contents in excess of 60 tons. Shipments to be weighed en route, and freight charged for actual weight.

Note 1.—Minimum weight, 10 per cent more or less than marked capacity of car. Excess of 110 per cent of marked capacity of car will be charged at double tariff rates.

Information regarding these rates may be obtained from

E. T. Eckles,
Asst. G. F. A.

E. M. Snith,
Asst. G. F. Agent.

Nashville, Tenn.

And traffic agents whose addresses are published in the original tariff.

(List of Ex-list agents.)

(Here follows Table marked page 43*b*.)

44 EXHIBIT #5 (Tariff Sheets).

45 EXHIBIT #6.

CINCINNATI, Sept. 4, 1909.

Sol. 53—729-L claim C 51931.
Ore from Emerson and Cartersville, Ga., to Dayton, Tenn.

Mr. Geo. Greaves, Freight claim agent.

DEAR SIR: Herewith returning papers in the above numbered claim enclosed with yours of Nov. 5th, 1908. Please note next attached copy of our letter of October 10. 1907, Sol 53—729 in connection with your claim G—45092 and 48966. Kindly arrange settlement of this claim on basis outlined therein.

Yours truly,

H. A. POVELEITE,
F. E. G.,
General Freight Agent.

Wjk-H-3.

EXHIBIT #7.

Oct. 10, 1907.

Claim G—45092, 48966.
Ore from Emerson and Cartersville, Ga., to Dayton, Tenn.

Mr. M. F. Molloy, Comptroller.

DEAR SIR: Herewith papers in the above claims.

I note that these claims have been paid on basis of 60 cents per ton. It will be proper for you to protect this rate on shipments coming from Cartersville which is in line with the R-196 I. C. C. 3269. This rate should divide by allowing the N. C. & St. L. to our tracks at Chattanooga 50 cts. per ton, C. N. O. & T. P. accepting the balance.

As we did not publich through rate from Emerson in above issue, rate of 70 cts. per ton as shown in N. C. & St. L. ore tariff should apply, which divides by allowing the N. C. & St. L. 50 cts. to
46 our tracks at Chattanooga, 20 cents to C. N. O. & T. P. We will arrange to correct our issue to basis of 70 cents from Cartersville.

Yours truly,

H. A. POVELEITE, *G. F. A.*

jet-H-9.

Mr. ARBOGAST: These claims were settled on basis of 60 cts. per ton, which is published in our issue R-196, I. C. C. 3269, from Cartersville, N. C. & St. L. Ore Tariff No. 8 advances the rate to 70 cts. per ton, dividing 50 cts. to Chattanooga and 20 cts. for our line, but our issue was never cor-ected. Presume you will wish to have our tariff put in line.

J. E. T.

EXHIBIT #8.

CINCINNATI, Jan. 2nd, 1909.

Sol 53—729-L G—51931.
Ore from Emerson and Cartersville, Ga., to Dayton, Tennessee.

Mr. POVELEITE: Attached claim covers shipments of ore from Emerson and Cartersville, Ga., to Dayton, Tenn., which moved during 1907. The N. C. & St. L. in their ore tariff No. 8 publish rate of 70 cts. from Emerson, which divides by allowing 50 cts. to our tracks, Chattanooga, and 20 cts. beyond, and this rate has never been re-issued by us. Tariff also publishes a rate of 70 cts. from Cartersville while our R-193 I. C. C. 3239 publishes a rate of 60 cts. this issue also showing the divisions which are as follows:

W. & A. 40 cts. from C. N. O. & T. P. tracks.
Beyond 20

I understand you recently had conversation with the Tenn. Coal & Iron Co. people in regard to this 60 cent rate. In view of this, will you kindly instruct as to disposition of attached papers. Our claims - —45092 and 48955 which covered similar cases were settled on basis of the 60 cts. rate. L. C. F. H.—29.

47 EXHIBIT #9.

October 30th, 1908.

Mr. BURCH: N. C. & St. L. Iron Ore Tariff 7, effective Dec. 4, 1903, carries a 60 cent rate on iron ore from Bartow, Cartersville, Emerson and Rogers Ga. to Dayton.

N. C. & St. L. iron ore tariff 8 effective March 5, 1907, carries the 70 cent rate from same points which rate is still in effect per N. & C. Iron Ore Tariff 17, effective Oct. 24, 1908, copy attached.

The 70 ct. rate applies at the present time to no other point. However, I note Rock Run, Ala., in Ore Tariff 7 had a 60 ct. rate, same as Dayton, and which was advanced to 70 in Tariff 8, but you will note this point now has a 55 cent rate from Bartow, Cartersville and Emerson and 50 cts. from Rogers. There was a general advance to all points at the time Dayton was advanced, but I have not checked subsequent changes.

Ore raw material tariff carries only Cartersville omittinf the other points.

H. C. C.

EXHIBIT #10.

CINCINNATI, Nov. 5, 1908.

G-51931, desk 7.

Mr. H. A. Poveleite, G. F. A. — Bldg.

DEAR SIR: The attached papers cover alleged overcharge on shipments of ore from Emerson and Cartersville, Ga. destined to Dayton, Tenn. in transit in the fore part of the year 1907.

I beg to call your attention to Mr. Cosden's letter claiming that 77 cts. is the correct rate while the R. R. sheet 193 effective Jan. 28th makes rate 60 cts. from Cartersville. I am unable to locate any rate from Emerson Will you kindly advise me proper rates to apply and I. C. C. number to cover, and oblige,

Yours truly,

____ ____,
Fr't Claim Agt.

48 EXHIBIT #11.

CHATTANOOGA, TENN., Sept. 24, 1908.

File D-48.
Claim G-51931.

Mr. George Greaves, F. C. A., Cincinnati, Ohio.

DEAR SIR: In reply to your next attached, and returning all papers herewith, beg to advise that I have no rate shet to cover this rate, at time shipments moved. However, Rate sheet R-935 effective Oct. 30, '07, which was amendment No. R-096 effective 1/26/07 quoted this rate. R-193 is not in my file.

Yours truly,

H. H. TAYLOR, *Agent.*
H.

EXHIBIT #12.

DAYTON, TENN., 7/21/08.

Mr. M. F. Molley, Comp., Cincinnati, Ohio.

DEAR SIR: Rate authority is Rate 244 M 2 Sub Pad 3 April 25, '07, and this was quoted by Mr. Taylor to D. C. & I. Co. The weights as corrected are those of the Dayton Coal & Iron Co. and will be certified to if requested.

Yours truly,

S. NELSON.

EXHIBIT #13.

NASHVILLE, TENN., March 17, 1908.

4788-K.

Mr. M. F. Molloy, Aud., Cincinnati, Ohio.

DEAR SIR: I herewith return your claim C-51931 covering
49 alleged overcharged on shipment of iron ore from Emerson, and Cartersville, Ga., to Dayton, Tenn. Our iron ore Tariff #8 effective March 7, 1907, names rate of 70 cts. divided to Chattanooga 50 cts. beyond 20 cts. per ton. This Tariff also states that the minimum charge is to be figured on the capacity of the car 10% more or less; we have no authority for the rate of 60 cts. as claimed by claimants and cannot apply their actual weights as shown. If

claim is amended to the proper basis and any overcharge is shown by our line, we will authorize.

Yours truly,

S. D. COWDEN,
Claim Agent.

PHM a

Deposition of S. H. Whitaker. Rec'd from P. O., Op'd & Filed Sept. 20, '12.

Interrogatories to be Propounded to S. H. Whitaker, a witness for Complainant in Above Cause.

1. State your age, place of residence and business.

2. In what business were you engaged from January to April 1907, for months previous thereto, and since; and if you say you were connected with the compl't Dayton Coal & Iron Co. Ltd. state what your connection then was and has since been.

Ans. to Int. No. 1. I am 47 years of age; my place of residence is in Cincinnati, Ohio; my business is Assistant to the Managing Director of the Dayton Coal & Iron Co. Limited. manufacturers of pig iron at Dayton. Tennessee. selling office at Cincinnati, Ohio.

Ans. to Int. No. 2. I have been engaged in the same business as just stated from January to April 1907. and for months previous thereto, and since; my connection with the Dayton Coal & Iron Co. Ltd. has been Assistant to the Managing Director since January 1906.

50 3. State where you were then located, probably how often you visited Dayton, Tennessee and what in a general way were your duties, as respects compl't company, both at Dayton and Cincinnati?

A. From January to April 1907, I was located at Cincinnati Ohio, and visited Dayton Tenn. about every 2 or 3 weeks; My duties with the Dayton Coal & Iron Co. Limited, are complete charge *pf* all commercial transactions of whatsoever nature both at Cincinnati, Ohio, and Dayton, Tennessee.

4. How long have you been connected with the compl't Company?

A. I have been connected with the Dayton Coal & Iron Co. limited, since January 1886.

5. What is the business of compl't, where is its manufacturing plant, and where is its selling office?

A. The Dayton Coal & Iron Co. Limited, manufactures pig iron at Dayton, Tenn. and its selling office is located at Cincinnati, Ohio.

6. In conducting the operations of compl't is it or not usual and customary to contract for sales of its output in advance and, if so, for probably how long in advance?

A. Yes, it is usual and customary to contract to sell the output of pig iron in advance; in some cases it is necessary to contract for one year in advance.

7. In order to do sos state whether or not it is usual and custom-

ary to buy iron ore, coal and coke in large quantities for future delivery?

A. Yes.

8. State if the foregoing custom as to sales and purchases has characterized iron making operations of compl't and others engaged in like business in East Tennessee for many years last past?

A. Yes.

9. State whether or not freight rates are items of material consideration in making both purchases and sales?

A. I regard them as the most vital thing in the manufacture of pig iron.

10. Prior to making purchases of ore and other supplies, for compl't during the year 1907 and prior thereto, state if it
51 was usual and customary to inquire of the Railroad Freight Agent located at Dayton, Tennessee for rates from points of purchase to Dayton?

A. Yes.

11. Was there any other railroad, agency or freight agency, of any kind located at Dayton, at that time or since, to your knowledge, except that of the C. N. O. & T. P. Ry. Co.?

A. No.

12. If you or one of your subordinates wrote a letter or otherwise inquired of said Ry. Co.'s agent at Dayton, Tenn., for rates on iron ore from Cartersville Emerson or other points outside of Tennessee, in the spring of 1907, state if you have copies of such letters or inquiries, and if so file same as exhibits hereto?

A. Before the contract for the ore was made with the seller I talked with Mr. Biles, Gen. Freight Ag't of the C. N. O. & T. P. Railroad Co. with regard to furnishing empty equipment for the handling of the ore and he took the matter up with the connecting lines, as it was customary for him to do. There was no doubt in my mind about the rate being 60 cts. per ton, from Cartersville and Emerson, Ga., to Dayton, Tenn., as this rate was stated to me by Mr. Biles, and I left him with the firm conviction in my mind that the rate would remain 60 cts. as we had been shipping on this rate for about 12 months, previous to April, 1907. In April, 1907, our office at Dayton, Tenn., had the rate again confirmed by the agebt at Dayton, Tenn., of the C. N. O. & T. P. R. R. Co., which letter confirming 60 ct. rate, I understand is attached as exhibited to the deposition of Robt. Thompson in this case, who is our Cashier at Dayton, Tenn.

13. State if the complainant company, upon the quotations of rates received in response, made any purchases and directed any shipments of ore from these points to Dayton, Tenn., and if so by whose authority?

A. Yes, contract for the ore was made on the basis of 60 ct. rate of freight then in existence on which we were shipping, and
52 confirmed by the R. R. Co. and the purchase of the ore was made and the shipments directed to be made on my authority.

14. If you say such purchase or shipments were made through

you or on your authority, then state whether or not you knew or understood at the time that 60 ct. was the freight rate from Cartersville and Emerson, Ga., at the time, and if so, from whom, and how you received the information?

A. At the time the purchase of this ore was made, there was not the slightest doubt that the rate from Cartersville and Emerson, Ga., to Dayton, Tenn., was 60 cts. per ton because we were and had for 10 months previous, been shipping on same. The R. R. Co. always made us rate of 60 cts. at the time purchase was made.

15. What was the custom of the Dayton Co. during and prior to the spring of 1907 if it wished to ascertain as to the freight rate, from any point outside Tennessee on shipments from such point to Dayton?

A. It was customary for us to ask the C. N. O. & T. P. R. R. Co. for rates of freight, from either their office in Cincinnati, Ohio, or from their agent at Dayton, Tenn.—generally application for the rates being made at both places to insure accuracy.

16. Could the compl't the Dayton Co. consistently refuse to take the iron ore shipped to it from Cartersville after April, 1907, which shipments are the subject of this controversy at 70 cts. per ton, and if not, why?

A. The ore was bought f. o. b. cars Cartersville, Ga., and we could not have refused shipment of same, for the reason that this would have been a breach of contract, with the seller, and furthermore the non-acceptance or refusal of the ore, would very likely have made it necessary for us to default on contracts for pig iron which were made, which ore we required to make the iron to deliver on our pig iron contracts, and consequently we would have been subject to further breaches of contracts to those to whom we had sold iron. We of course, were compelled to live us to our contracts, and ex-
53 pected the C. N. O. & T. P. to do the same.

17. What did the compl't the Dayton Co. do immediately on receiving notice of an increased freight rate from 60 cts. ton to 70 cts. per ton?

A. Some months after April, 1907, I was very much surprised to learn that the R. R. Co. was making claim on us for 10 cts. per ton, and that this was due to an advance in freight rates from Emerson and Cartersville, Ga., to Chattanooga, Tenn., from 40 cts. to 50 cts. per ton on ore going to the Dayton Coal & Iron Co. Chattanooga, Tenn., while the rate when otherwise consigned to Chattanooga proper, remained at 40 cts. per ton. As this was a gross discrimination against the Dayton Coal & Iron Co. Limited, I declined to make payment of the claim and particularly so for the reason that the C. N. O. & T. P. R. R. Co. had given us a rate of 60 cts. from points of shipment to Dayton, Tenn. I think that if Chattanooga furnaces pay 40 cts. rate of freight from Emerson and Cartersville, Ga., to Chattanooga, Tenn., that the Dayton Coal & Iron Co. Ltd. should only pay 40 cts. Unless this is done it amounts to a rebate in freight on pig iron for the Chattanooga furnace—thus grossly discriminating against us.

18. State if you investigated to ascertain about the time the bill

was filed herein, whether either the deft's N. C. & St. L. Ty. or W. & A. R. R. Co. had any offices lr maintained any agencies in Cincinnati, Ohio, or within the jurisdiction of the U. S. Circuit Court at Cincinnati, and if so, what did you find?

A. We investigated the N. C. & St. L. Ry. Co. and the W. & A. R'y Co. and could not find that they had an office or maintained any agency in Cincinnati, Ohio.

19. State anything further you may know or deem material herein?

—. —.

Further this deponnet saith not.

SAMEUL H. WHITAKER,
Assistant to the Managing Director
The Dayton Coal & Iron Co., Ltd.

W. B. MILLER,
Sol'r for Compl't.

54 Sworn to and subscribed before me on this the 19th day of September, 1912.

[SEAL]

GEO. B. MUNDY,
N. P., Hamilton County, Ohio.

STATE OF OHIO,
County of Hamilton:

I, the undersigned Notary Public, hereby certify that the foregoing deposition was taken before me, as stated in the caption, the answers of the witness reduced to writing by me, and that I sealed said deposition up and put it in the Post Office, addressed to the Clerk & Master, Chattanooga, Tenn., without same being out of my possession, or altered after being taken.

I further certify that I am not of kin, or counsel, to either of the parties, and have no interest in the cause, wherein said deposition was taken, and that under the laws of Ohio I am authorized to administer oaths and take depositions, and that my commission as N. P. is dated 21st day of June, 1911, and expires the 2nd day of July, 1914.

In testimony whereof, witness my hand and official seal this 19th day of Sept., 1912.

GEO. B. MUNDY, *N. P.*

Deposition of Frederick D. Claggert. Rec'd from P. O., Op'd & Filed Sept. 5.

The Depositions of Frederick D. Claggert and John V. Bryant, witnesses for the defendants, taken by agreement at the office of Harmon, Colston, Goldsmith & Hoadly, in the St. Paul Building, 111 E. 4th Street, Cincinnati, Ohio, on Tuesday, Aug. 27th, 1912, in the presence of Joseph Brown, Esq., representing the N., C. & St. L. Ry Co.; Robert Pritchard, Esq., representing the C., N. O. & T. P. Ry. Co., and W. B. Miller, Esq., representing the Dayton Coal & Iron Co.

It is agreed by counsel for the parties that the depositions may be taken down in shorthand, by Douglas A. Brown, and expert stenographer, after the witnesses shall first have been duly sworn, before giving their testimony by the notary, Eugene Bruss-
55 man, of Cincinnati, all formalities of caption, certificate transmission etc. being waived.

Said witness FREDERICK D. CLAGGERT of lawful age, being first duly cautioned and sworn, deposed as follows, to wit:

Direct examination.

By ROBERT PRITCHARD, Esq., Att'y for C. N. O. & T. P. R'y Co.:

1. Mr. Claggert, please state where you reside, and what connection, if any you have, with the C. N. O. & T. P. R'y Co.?

A. I am ass't General Freight Agent of the C. N. O. & T. P. R'y with headquarters at Cincinnati, Ohio.

2. How long have you *hale* that position?

A. I was appointed to that position effective June 1st, 1912, after a service of slightly over 15 years with the Company.

3. Prior to the date of your appointment, to that position, what connection did you have with your company, and with the tariff rates issued by connecting lines?

A. I was Chief Clerk in the Freight Traffic department, in charge of rates, tariffs and related matters.

4. State whether or not, on and prior to Feb., 1907, you were familiar with the joint freight tariff rates issued by connecting lines in connection with the C. N. O. & T. P. R'y Co. and whether you have been familiar with them subsequent to that date?

A. I was and have been.

5. Please state what joint tariff issued by the N. C. & St. L. R'y Co. in connection with the C. N. O. & T. P. R'y Company, was in force prior to March 5, 1907, governing freight charges on shipments of iron ore from Emerson, Rogers and Cartersville, Ga., to Dayton, Tenn., and if you have a copy of the iron ore tariff that is in force, please file it as exhibit to your deposition?

A. The tariff of the N. C. & St. L. R'y Co. in effect prior to March

5, 1907, and containing rates on iron ore, carload, from Cartersville, Ga., and Emerson, Ga., to Dayton, Tenn., is N. C. & St. L. R'y Co., Iron Ore Tariff No. 7 I. C. C. No. 1314*a* effective Dec. 4,
56 1906, issued in connection with C. N. O. & T. P. R'y Co. tariff in question which I submit as exhibit "A" authorizes rate of 60 cts. per ton of 2240 pounds on iron ore, carload, Cartersville, Emerson and Rogers, Georgia, to Dayton, Tenn.

6. Are all the initial points you mentioned namely, Rogers, Emerson, and Cartersville, Ga., on the line of the N. C. & St. L. R'y?

A. I understand they are on the Western & Atlantic Railroad, which is operated under lease by the N. C. & St. L. Railway.

7. State whether or not that rate of 60 cts. fixed by the tariff was concurred in by the C. N. O. & T. P. R'y Company, and if so, in what manner the concurrence of that company was indicated or shown and how if it is shown, it is shown upon the tariff itself?

A. The rate of 60 cts. per ton from the points in question to Dayton, Tenn., was issued in connection with the C. N. O. & T. P. Railway. Prior to the publication of the rate in question, from Cartersville, Ga., correspondence was had between the respective Traffic Dep't of the C. N. O. & T. P. and the N. C. & St. L. as a result of which the rate of 60 cts. from Cartersville was published. I understand that the rate from Emerson and Rogers was published by the N. C. & St. L. R'y Co. the same as from Cartersville, without any particular correspondence with the C. N. O. & T. P. R'y.

8. Was there any evidence of any concurrence on the part of the C. N. O. & T. P., R'y Co. in Iron Ore Tariff No. 7, other than that indicated on the face of the Tariff itself?

A. There was not.

9. At that time, namely, at the time of the issue of Iron Ore Tariff No. 7 how was the concurrence of connecting carrier signified, if at all, in a tariff issued by the initial carrier.

A. The initial carrier in publishing joint rates of freight on interstate tarffic showed usually on the title page or on some other page referred to on the title page, a list of the carriers participating in said joint rates, as was done in the case of Iron Ore Tariff No. 7, issued by the N. C. & St. L. R'y.

10. State whether or not it was the custom of connecting carriers at and prior to the date of the Issuance of Iron Ore Tariff No. 7 to file with the Interstate Commerce Commission, or with the
57 initial carrier any express signification of its concurrence a rate other than or in addition to the mere publication on the Tariff itself of the names of the connecting carriers?

A. It was not.

11. In case of the con-currence of connecting carrier, in a rate made by an initial carrier, what course was taken?

A. The carrier shown as a participating line would notify the publishing carrier of its objection if any, to the rates to which it was shown, as a participant, and the rate would thereupon be adjusted.

12. If a connecting carrier did not indicate its objection or non-

concurrence, state whether or not the Tariff was treated as effective without further notice of any concurrence?

A. It was.

13. When was iron ore tariff No. 7 superseded and by what tariff was it superseded?

A. N. C. & St. L. Iron Ore Tariff No. 7 I. C. C. 1314*a* was superseded by N. C. & St. L. R'y Iron Ore Tariff No. 8 I. C. C. No. 1351*a* effective March 5, 1907.

14. I here exhibit to you what purports to be the joint freight tariff called Iron Ore Tariff No. 8 filed as an ex. #5 to the deposition of Robert Thompson, taken in this cause, on behalf of the compl't on March 29th, 1912, and I will ask you to state whether or not that is the iron ore tariff to which you refer as having superseded Iron Ore Tariff No. 7?

A. It is.

15. Does that embrace the same initial points which were embraced by iron ore tariff No. 7?

A. It embraces the three points in question, that is, Cartersville Emerson, and Rogers, Ga.

16. What through rate does that fix from these points to Dayton, Tennessee?

A. 70 cts. per ton of 2240 lbs. on Iron Ore C. L.

17. Did the N. C. & St. L. R'y Company notify the C. N. O. & T. P. R'y Co. of the issuance of Iron Ore Tariff No. 8 and furnish copy?

A. The only notice given the C. N. O. & T. P. R'y of the issuance of the N. C. & St. L. R'y Iron Ore Tariff No. 8 was the fur-
58 nishing the C. N. O. & T. P. R'y a copy of that tariff. The N. C. & St. L. R'y did not advise the C. N. O. & T. P. of an intention on increasing the freight rate on iron ore from the points in question to Dayton, Tenn.

18. Can you give us the date upon which the N. C. & St. L. R'y Co. furnished C. N. O. & T. P. with a copy of iron ore tariff no. 8?

A. My file copy of N. C. & St. L. R'y Iron Ore Tariff No. 8 bears General Freight office receipt stamp date Feb. 5, 1907, the tariff having been issued Feb. 2, 1907.

19. When did it become effective?

A. It became effective March 5, 1907.

20. State whether or not it is a uniform custom of the Freight office to stamp the date of receipt upon tariffs furnished it, and whether those dates are correct as stamped?

A. It is our custom to stamp the date upon which the tariffs are received in the office and such date is reasonably accurate. It may vary a day or two.

21. State whether or not the Iron Ore Tariff No. 8 shows with what roads the N. C. & St. L. R'y was connected in the issuance of that tarriff?

A. Tariff in question shows that it was issued in connection with Alabama Great Southern R. R., C. N. O. & T. P. R'y, Louisville & Nashville R. R. Seabo-rd Air Line R'y and Southern R'y.

22. At the time of the issuance of that Tariff No. 8 did the cus-

tom heretofore mentioned by you as being in existence at the time of the issuance of Iron Ore Tariff No. 7 that concurrence was shown only by the publication of the names of the connecting carriers stil- prevail?

A. It did.

23. State whether or not the publication of the connecting lines on the tariff itself was by the roads concerned treated as an indication of *there* respective concurrence in the tariff as the time of the issuance?

A. As far as concerns the C. N. O. & T. P. R'y it was so treated; I cannot speak for the other lines.

Foregoing question and answer thereto excepted to because the question is both leading and suggestive, objection overruled and compl't appeals to the Chancellor.

59 24. State whether of not the C. N. O. & P. R'y Co. made or filed any other or additional concurrence in iron ore tariff No. 8 beyond the publication of its name, as one of the connecting lines on the tariff itself?

A. It did not.

25. State whether or not from and after the date that Iron Ore Tariff No. 8 became effective, the C. N. O. & T. P. Ry. Co. conformed to the rate therein fixed and made freight charges accordingly.

A. The C. N. O. & T. P. R'y Company, attempted to collect freight charges based upon the rate shown in the N. C. & St. L. R'y Iron Ore Tariff No. 8.

26. State whether or not the prior rate of 60 cts. was cancelled or superseded and whether or not the C. N. O. & T. P. R'y Company regarded the rate of 70 cts. as the legal rate and made freight charges accordingly?

A. The previous rate of 60 cts. per gross ton, from the points in question to Dayton, Tenn., as published in N. C. & St. L. R'y Iron Ore Tariff No. 7 was superseded by N. C. & St. L. R'y Iron Ore Tariff No. 8 carrying rate of 70 cts. per gross ton, from points in question to Dayton, Tenn., which rate the C. N. O. & T. P. regarded as the lawful rate and attempted to collect freight charges based thereon.

27. State whether or not the C. N. O. & T. P. Ry. Co. made settlements with the N. C. & St. L. R'y Co. the initial carrier, upon the basis of the new rate of 70 cents?

A. I had no immediate connection with the transaction between our agent at Dayton, Tenn., and the Dayton Coal & *T*ron Co. in his collection or attempt to collect freight charges on the shipments in question. I understand, however, that after considerable dispute as to these charges our Comptroller attempted to collect freight charges based upon the rate of 70 cts. per ton, but was unsuccessful.

28. Do you mean as between the carrier and the *d*onsignee the Dayton Coal & Iron Co.?

A. Yes sir.

29. State whether or not you know whether the N. C. &
60 St. L. got its full proportion of the——

A. I understand that the N. C. & St. L. R'y received from the C. N. O. & T. P. R'y Co. its full proportion of the published tariff rate of 70 cts. on this business.

30. State whether or not the C. N. O. & T. P. R'y Co. ever disclaimed or objected to the new rate of 70 cts. established by the Iron Ore Tariff No. 8.

A. After the rate of 70 cts. per ton as covered by the N. C. & St. L. R'y Iron Ore Tariff No. 8 was brought to our attention, we wrote the N. C. & St. L. R'y Co. calling their attention to the fact that they had advanced this through rate of 60 cents without consulting us or in any way advising us of their intention to do so. We did not however, file any notice with the Interstate Commerce Commission of Non-participation in the 70 cent rate as covered by Iron Ore Tariff No. 8.

31. Did or did not the C. N. O. & T. P. R'y Co. indicate to the Interstate Commerce Commission a refusal to participate in the joint rate named in Iron Ore Tariff No. 8.

A. We did not.

32. State whether or not the C. N. O. & T. P. R'y Co. notified the N. C. & St. L. R'y Co. of its refusal to participate in the rate named in Iron Ore Tariff No. 8.

A. We did not; on the contrary, we attempted to assess freight charges based upon this 70 cent rate which was the lawful rate.

33. As I understand, the C. N. O. & T. P. Railway Co. had nothing whatever to do with the making of this rate named in the iron ore tariff No. 8?

A. We did not.

34. State whether or not the C. N. O. & T. P. Railway Co. recovered any additional compensation or any profit from the advance of the rate from 60 to 70 cents?

A. We did not.

35. State whether or not the proportion of the freights received by the C. N. O. & T. P. R'y Co. remained the same under the new tariff No. 8 was it under the old Tariff No. 7?

A. It did.

61 Cross-examination.

By W. B. MILLER, Esq., sol'r for Dayton Coal & Iron Co.:

1. Where was your office maintained during the years 1907, 1908 and 1909?

A. Upon the 4th floor of the Ingalls Building, Cincinnati, Ohio.

2. What was your connection with the def't C. N. O. & T. P. R'y Co. during those three years?

A. To the best of my recollection I was either Chief Clerk or Ass't Chief Clerk in the Freight Traffic Dep't.

3. Who was the General Freight Agent, and your immediate superior at that time?

A. My immediate superior was Mr. H. A. Poveleite who is now our General Freight Agent.

4. Was Mr. Poveleite's office immediately contiguous to your at the time, or were you in his office?

A. He had a private office of his own, and I was not located immediately in that office, but I was in the General Freight Office near his private office.

5. I will get you to examine exhibit No. 2 to the deposition of witness Robert Thompson, taken for the compl't in this case, and state if you recognize that signature of Mr. Poveleite as being genuine o- authorized by any one who was accustomed to affix his signature to papers of that kind and had authority to do so?

(Handing Witness.)

A. The signature in question is not Mr. Poveleite's personal signature; I judge from the initial "K." shown beneath that signature, and from the initials "M. K." shown in typewriter at the left of the page that this letter was signed by a clerk in the General Freight office who is not now nor has he been for some time connected with the C. N. O. & T. P. R'y Co.

6. Do you know the name of that Clerk?

A. Yes sir, Mark Kerr.

7. Was he accustomed to sigh Mr. Poveleite's name to papers of that kind?

62 A. Yes sir.

8. You recognize that signature by Mr. Kerr as being within his ordinary duties and powers at that time, do you not?

A. Yes sir.

9. What is Ex. #3 to deposition of Thompson?

A. It is C. N. O. & T. P. R'y Tariff R-196 I. C. C. No. 3239 containing rates on raw material to Dayton, Tenn., from various points including Cartersville, Ga.

10. Who prepared or caused to be prepared that exhibit No. 3?

A. I don't know. Do you mean, prepared as an exhibit or do you mean who issued the tariff, or what?

11. Who issued the Tariff of caused it to be prepared? I do not mean who caused it to be filed; I mean who caused it to be made up originally in its initial form?

A. Whos caused this publication to be issued?

12. Yes sir.

A. It was issued by the General Freight agent, of the C. N. O. & T. P. Railway, doubtless by some clerk in the office, I don't know just who the Clerk was.

13. I mean by what authority was it issued, Mr. Claggett, who inspired it, who directed it?

A. As to the rate on iron ore from Cartersville Ga. do you mean?

14. Not particularly.

A. If I am to answer you technically, you understand there are a whole lot of rates in here, that I could not say off-hand who inspired them. If you are speaking of some particular rate, of course I will answer as to that. I should not like to make a broad state-

ment that this whole statnmene was inspired by any one because I could not answer as to that.

15. Who caused it to be published if you know?

A. It was published by the General Freight Agent of the C. N. O. & T. P.

16. Wasn't it issued and circulated along the line of the C. N. O. & T. P. R'y Co. in the ordinary transaction of its business and routine.

A. Yes sir.

17. The object of that was to advise prospective purchasers of the rates as shown in and on that Tariff Sheet, was it not?

63 A. It was not necessarily issued for the purpose of advising prospective shippers of the rate, because it is customary for the initial line to publish the tariffs applying from points on their line. This was issued as a matter of information principally for our agent at Dayton, Tennessee. I am now addressing myself to the ore rates, you understand—the rate primarily is supposed to be published by the N. C. & St. L. R'y on whose line those points of origin are located,—it is customary in other words, for the initial line to publish its tariff rates on interstate freight. It was not necessary for the C. N. O. & T. P. R'y to use this tariff in order to make the rate legal. This rate becomes the rate when it is published by the initial line, the N. C. & St. L. R'y in the *susal* form as prescriben by the Interstate Commerce Commission, and when it has been posted, and filed with the Interstate Commerce Commission, it becomes effective upon the date indicated upon the Tariff. This Tariff to which you refer as exhibit No. 3 is absolutely unnecessary so far as rendering effective the rate on Iron Ore from any point on the W. & A. Railroad, of the N. C. & St. L. R'y to Dayton, Tennessee.

(To so much and such parts of the answer above by the witness as purports to state the law of the case, exception is taken, because the same is not responsive to the question, and at most is merely a statement of the witness' opinion; exception overruled, and appeal is taken to the Chancellor.)

18. Then if I understand, the only object of the C. N. O. & T. P. R'y Co. in issuing this Exhibit No. 3 to witness Thompson's deposition and distributing same along its line of railroad, was merely to advise its local agents of the rates shown there from?

A. That was not the only object, no sir, it is necessary that our Comptroller and our freight claim agent and possibly other officers, be advised of rates that apply to points on and via the C. N. O. & T. P. Railway. We are responsible, that is the Freight Traffic Department, is responsible, for keeping the other officials of the C. N. O. & T. P. R'y advised of rates lawfully in effect by the

64 C. N. O. & T. P. Railway, and the N. C. & St. L. R'y, for instance does not undertake to furnish its publications to the Accounting Dep't of our line, that duty develoelopes upon us. Hence this Tariff.

19. Then of course your agent at Dayton, in the ordinary course of business would refer to this Exhibit No. 3 to Thompson's deposition if he were asked for a quotation of shipments of ore from Cartersville and other points, would he not?

A. I cannot say that he would, because I understand that he didn't, in fact he asked our office what the rate was before he quoted it, which showed that he didn't rely upon this tariff.

20. Wasn't it the intention of your office that your agents should be governed by these quotations and didn't that actuate you to send them along the line and distribute copies of this Freight Tarjff in question?

A. It was the intention of our office that our agents should assess the lawfully published tariffs, and to the extent that any tariff of this nature that we might publish as a matter of information, names the lawful rate; to that extent, he is supposed to apply it, and no further.

21. Well, Mr. Claggett, considering the fact that your office distributed those sheets along its road to the local agents now assuming that the local agent at Dayton, was inquired of for a rate on ore from Cartersville, Ga. what rate was he expected to quote, having that particular Tariff then on file and no other?

A. He is expected to quote the lawfully published tariff rate. In this particular instance, when he was asked for a rate on ore from some one, of these W. & A. pointsm he asked our office for the correct rate.

22. How did your office expect or assume that your agent at Dayton, Tennessee would be advised of this lawful rate of which you speak, if he did not obtain it by reference to this tariff sheet which you sent him?

A. We had no immediate cognizance of the lawful rate ourselves till it was brought to our attention specifically.

65 23. What did you send this sheet to the Agent at Dayton carrying a 60 cent rate if you did not expect him to be guided by it?

A. At the time that sheet was sent him as a matter of information the 60 cent rate was a reproduction of the lawfully published rate of the N. C. & St. L. R'y. The N. C. & St. L. R'y without any notice t- us, changed their freight rate which made our information to the agent at Dayton incorrect.

24. Then at the time this Exhibit No. 3 was sent to the Dayton agent, as I understand, it named the correct rate, and it was sent there for the purpose of advising your Dayton agent what that correct rate was?

A. That's right.

25. Now, as you understand this controversy the Dayton Coal & Iron Co. the compl't desired to have some ore shipped from Cartersville, Emerson, Rogers and other points, and applied to your agent at Dayton, for rates on that ore, and he quoted them at a 60 cent rate isn't that the fact?

A. That is my understanding.

26. You say that your Dayton agent applied at your office at Cin-

cinnati for a rate on those shipments or proposed shipments. What does your information on that subject consist of?

A. My office records, correspondence, memoranda etc.

27. And what rate did your Cincinnati office name to your Dayton Agent?

A. 60 cts. per ton.

28. And thereupon he quoted it to the Dayton Coal & Iron Co.?

A. I understand so.

29. And the Dayton Coal & Iron Co. then had the ore shipped from these points and was willing to settle on the basis of 60 cts. per ton, and in the meantime before final settlement, was made, your Co. learned that the connecting carrier had advanced the rate to 70 cts. and your Co. demanded the 70 cents payment of the Dayton Company?

A. Yes, that is correct.

30. The advance of the rate from 60 cts. per ton to 70 cts.
66 to which you have testified in chief was made without conference or correspondence so far as you know between the W. & A. and the N. C. & St. L. R'y Co. on the one side and your Co. on the other?

A. That is correct.

31. Now you stated in chief that when this advance of 10 cts. per ton to Dayton, Tenn. was brought to the attention of your company, the C. N. O. & T. P., that your Co. wrote the initial carrier drawing its attention to this advance, will you tell us the beginning date of that correspondence?

A. July 27th 1908.

32. Will you just read into the record what was said to the initial carrier on that subject, file an exact copy of the letter to which you refer as an exhibit to your deposition, as you prefer?

A. I file herewith copy of the letter to which you refer as Ex. B to this my deposition.

33. I find that that letter purports to have been written or signed by Mr. Poveleite your General Freight Agent.

A. Yes sir.

34. Now, as I understand, the copy of letter which you file as Exhibit B is a copy of letter that was sent in due course to Mr. Charles Barham, Gen. Freight Agt. of the N. C. & St. L. R'y Co. at Nashville, Tenn.?

A. Yes sir.

Mr. MILLER: The Nashville, Chattanooga & St. Louis R'y Co. and the defendant W. & A. Railroad are both hereby notified through their counsel now present, Mr. Joe Brown, to produce the original of Ex. B on the hearing of this cause, and in lieu of such production Ex. B. will be offered in evidence and read as the best evidence obtainable, by the complainant.

Mr. BROWN: If counsel wants this letter in evidence Mr. *Br* Brown is a resident of Nashville, Davidson County, Tennessee, and counsel for compl't can take his deposition and have him exhibit

the letter in the ordinary way by subpœna for him to bring the letter with him.

35. Are you acquainted with Mr. T. C. Powell, Vice Pres't
67 of the defendant C. N. O. & T. P. R'y Company?

A. I am.

35. Known him for a number of years?

A. I have.

36. Are you acquainted with his signature?

A. Fairly well, I sup-ose.

37. Examine the [illegible] here shown you, dated May 4th 1908, signed "T. C. Powell, [illegible]ice Pres't" and addressed to the Dayton Coal & Iron Co., Cincinnati, Ohio, and state whether or not Mr. Powell's genuine signature appears attached to that letter?

A. It appears to be genuine.

38. In your best judgment it is his genuing signature is it not?

A. It is to the best of my judgment.

39. Have you a large correspondence file in front of you now to which you have frequently referred while giving this deposition?

A. I have.

40. State whether you have a copy of purported copy of this letter by Mr. Powell in your said file.

A. I don't appear to have it.

41. Will you examine the copy of memorandum by Mr. Biles attached to Mr. Powell's said letter, and see if you have a duplicate of that in your file?

A. I have what appears to be a copy of it.

42. Who was Mr. Biles at that time, and what position did he fill?

A. Freight Traffic Manager, of the C. N. O. & T. P. R'y.

43. Speaking from your file, and from your knowledge of this, and similar transactions, state whether or not the purported copy of Mr. Biles' memorandum dated May 1st 1909 and addressed to Mr. Powell, is genuine?

A. It appears to be.

44. I will get you to file Mr. Powell's letter to the Dayton Co. about which you have been testifying, with Mr. Biles' memo. on the same subject, as Ex. C and D respectively to this deposition?

A. I do so.

45. Examine the purported letter written by the compl't
68 company, to Sam Nelson, Agent, dated Feb. 10, 1908, and please state if you have the original or a purported copy of that communication in your private file to which you have referred heretofore?

A. I don't seem to have that Mr. Miller, it is certainly nowhere near that date if I have.

46. Will you please file the purported copy of letter inquired about as Ex. E to your deposition?

A. Yes sir, I now do so.

(Defendants object to the letter dated F'rby 10, 1908, and purporting to be signed "Dayton Coal & Iron Co. Ltd., Robert Thompson

Cashier" and addressed to Sam Nelson Agent, City, as evidence in this case, for the reason that it is a self serving declaration on the part of the complainant, and does not appear to be a communication to any person authorized to represent or bind either of these defendants; foregoing objection is overruled, and defendants appeal to the Chancellor.)

The witness referring to a former question and answer states as follows:

The WITNESS: With respect to your question as to our agent at Dayton, Tenn., having quoted the Dayton Coal & Iron Co. a rate of 60 cts. per ton on Iron Ore C. L., from the Georgia points named in the question to Dayton, Tenn. and the Dayton Coal & Iron Co. thereupon arranging to make shipments I find as early as June 1908, the Dayton Coal & Iron Co. refused to pay freight charges based upon the 70 cent rate as published by the N. C. & St. L. R'y although they continued shipments to and including Dec. 19, 1908 for a period of 6 months after they had been advised of the 70 cent rate.

47. You know that in the pig iron manufacturing business in which th- Dayton Coal & Iron Co. was engaged, it was the custom of manufacturers to sell their product for a period of months ahead, don't you Mr. Claggett?

A. I understand that they sell in that way yes.

48. And it is the custom also to buy the raw material months in advance, isn't it?

69 A. I so understand.

49. Now, at the time this Ex. #3 attached to Mr. Thompson's deposition was issued, and during the entire period in dispute in this case, isn't it true that the N. C. & St. L. and W. & A. freight rate from Cartersville, Emerson, and Rogers to Chattanooga was 40 cts. per ton on iron ore?

A. I can testify from the period from Dec. 4, 1907, till the end of the period in question the local rate from there to Chattanooga proper was 40 cts. per ton, but as to having any tariff to verify it prior to that time, I find that my file says that the N. C. & St. L. Tariff No. 3 can be seen in our office, so I cannot testify to that. I can testify that from a period that I mentioned, to the end of this movement, in question, the rate was 40 cts.

50. Accordingly to your best recollection wasn't it 40 cts. from the beginning of the period in controversy up to Dec. 1907 also?

A. I really cannot say that I am competent to give any recollection, because that is one of a thousand things that come up, and I have no recollection of it particularly.

51. It is true that the local rate of your Co. on iron ore per gross ton from Chattanooga to Dayton was 20 cts. isn't it?

A. 20 cts. was the rate during the entire period from Chattanooga proper, C. N. O. & T. P. Railway tracks.

52. Now on the assumption that the local rate of the def'ts N. C. & St. L. and W. & A. Railways from Emerson, Cartersville and Rogers to Chattanooga was 40 cts. per ton during this period in controversy then the total of the local rates over those roads to Chat-

tanooga and from Chattanooga to Dayton, over your line, would have been 60 cts. per ton during the period in controversy?

A. Yes sir.

53. There was a competitor of the Dayton Coal & Iron Co. carrying on the manufacture of pig iron at Chattanooga during the period in controversy, namely, the Citico Furnace Co. I believe?

A. I believe they were in blast at or during that period, or during a part of it.

70 54. That Citico Furnace Co. derived its ore supply from the same territory or partizlly the same territory as the Dayton Coal & Iron Co. didn't it?

A. I cannot say specifically, just where they got it, because I don't know.

55. Was there any change so far as you are advised, by the W. & A. or the N. C. & St. L. R'y Companies, in the rate as published prior to Feb'y 1907 throughout the entire period in controversey on iron ore from Rogers, Cartersville and Emerson, as respects shipments of iron ore to points North of Dayton, say Rockford, Tenn.?

A. In other words, you mean, did the rate from these same points of origin to Rockwood change during the period of the movement in question?

56. Yes sir.

A. I am unable to answer your question, because I don't have copies of the N. C. & St. L. Railway tariffs if there be such covering the rates to Rockwood, Tenn.

57. So far as you know there was not any Joint Tariff between the N. C. & St. L. and the W. & A. and your line that would apply to ore shipments from Cartersville and the other two points to Rockwood during that period?

A. I cannot answer that right now. I can answer you by looking it up; I didn't anticipate that question, and didn't prepare myself to answer it.

58. I will ask you in response to this question, before closing the deposition, to ascertain if there was a Joint Tariff promulgated by those two lines and yours, and if so, when and how and what period of the period in controversey, it covered?

A. If I don't find any joint tariffs in my files to Rockwood, covering that, and I would not say affirmatively that there was any Joint Tariff; there are thousands upon thousands of these tariffs being issued all the time, *scads* of them all the time, volumes of them, and I will not make an affirmative or negative statement of that kind without anything to verify what I am talking about. I can, however, get the information and I will gladly do it if you wish me to.

71 59. I have not asked, and do not ask, you to furnish anything except as to a Joint Tariff, in which your road concurred; now if you did concur, would you not have a record of it in your office accessible to you?

A. Not necessarily back in that period; the chances are 99 out of a hundred I would not have.

60. If you have any evidence of a joint rate promulgated by the

3 lines, in question, from Cartersville, and the other points to Rockwood during the period in controversy or any portion thereof; I will ask you to file same as Ex. F to this your deposition.

A. I will do so.

61. I understand that in case there was no joint rate promulgated by the lines or by one of them, and concurred in by the others, the rate that a shipper would pay would be the sum of the local rates from Cartersville to Chattanooga and then from Chattanooga to Rockwood or Dayton, as the case might be, is not that the fact?

A. Assuming *y*hat *y*he sum of the locals through some other intermediate point did not *l*ake less.

62. Isn't it true, Mr. Claggett to the best of your information that realizing there was no competing line, the def'ts N. C. & St. L. R'y Co. and the W. & A. simply arbitrarily raised this rate from 60 to 70 cts. after they learned that the Dayton Co. had bought this ore supply and was dependent upon it for its output of ore?

A. My information is diametrically to the contrary; my information is, that the rate from these 3 points in question in Ga. to Dayton, Tenn. was revised in line with the general revision of the raw material ore rates of the N. C. & St. L. R'y and there was no disposition whatever to work any hardship on any one or to create any unjust discrimination at any point.

63. They managed to revise the rate upward to Dayton, but didn'*n* revise it to Chattanooga where the Citico Furnace was operating, it seems?

72 A. There is a reason for that Mr. Miller, the W. & A. or N. C. & St. L. R'y in making rates on iron ore as raw material from producing points on their line to Chattanooga for melting into iron reasonably expect and receive outbound shipments of pig iron commensurate to the tonnage of raw material that is hauled inbound to the furnace at nominal rates; consequently, the N. C. & St. L. or W. & A. Railroad, would not have the same ground for making a nominal rate or basing rate to Chattanooga, on ore for Dayton, Tenn. a furnace on another line where they had no assurance of receiving an outbound haul on the manufactured pig iron commensurate with the tonnage of raw material manufactured inbound.

64. T*y*ey did not have the same opportunity to arbitrarily name rate to Chattanooga either, because there were several competitive lines there of railroad, isn't that true, whereas there was none at Dayton?

A. There are competing lines of railroad at Chattanooga but pig iron as a commodity, speaking from freight traffic standpoint is such an extremely competitive commodity, the production and marketing of it is done under such keen competition, that the competitive conditions surrounding this commodity take care of rate adjustment whether the furnace be local or competitive point. The fact that a furnace continues in successful operation is a fairly good warranty that it has reasonable freight rates regardless of its location, whether at local or competitive point.

65. Then freight rates constitute a material factor in pig iron manufacture?

A. I would rather not answer your question; I am not a pig iron manufacturer.

66. What was the rate on pig iron from Chattanooga to Cincinnati over your line during the period in controversy and waht was its rarate, on pig iron from Dayton, to Cincinnati?

A. I am not prepared to answer without looking at the tariffs; I believe the present rate on pig iron from Chattanooga to Cincinnati is $2.75 and from Dayton probably $2.55 but I do not know what the rates were at this particular period, whether the same as now or not. It is really a matter of tariff, I have not the information with me.

73

67. Please refer to your file and state if you find therein, a letter or purported letter signed by Sam Nelson, dated Feb'y 10, 1908, addressed to Robert Thompson, Cashier, Dayton, Tenn., referring to claims C 4092 and G 60458?

A. I ahve looked through this file; I have no record of that letter at all; I have not got it in date order.

68. Who was Sam Nelson at that time?

A. I believe he was our agent at Dayton, Tennessee about that tiem.

69. Please file this purported copy of letter from Mr. Nelson, as Exhibit G to your deposition?

A. I do so.

(Defendants object to what purports to be a copy of letter from Sam Nelson, to Robert Thompson, dated Feb'y 10, 1908, because the same is not proved, or susceptible of proof, because the original is or ought to be in the possession of the compl't and its loos is not accounted for, and because the Sam Nelson, supposed writer of the letter in question is not shown to have any authority to either make rates or bind the def't- or either of them in relation thereto, or to bind either of the def'ts concerning the matters mentioned in the alleged copy, and the foregoing exception is overruled and the def'ts appeal to the Chancellor.)

70. Please examine Ex. #7 to the deposition of Robert Thompson, dated Oct. 10, 1907, purporting to be a communication to Mr. M. F. Molloy, Comptroller, signed by H. A. Poveleite, General Friehgt Agt. an- say if you have in your private file at present a copy of that purported letter.

A. I have what appears to be a copy.

71. State whether or not you recognize this Ex. #7 as being a copy of a communication addressed to Mr. Molloy by Mr. Poveleite.

A. It appears to be a copy.

72. Where would the original of that communication be Mr. Claggett?

74

A. Presumably with Mr. Molloy, comptroller, to whom it was addressed.

73. And he is the comptroller of the defendant C. N. O. & T. P. R'y Co.?

A. Yes sir.

74. I will get you to produce and file the original of that communication by inquiring of Mr. Molloy therefor, marking the same Ex. H to this desposition?

(Def't C. N. O. & T. P. R'y Co. objects to this course of examination in asking the witness to look up and produce papers from other offices to be filed at some future time, and shall object to the production or use of any documentary or other evidence nor produced while the deposition is being taken so as to give opportunity for inspection and cro's-examination if necessary, of the witness, concerning such documents; the foregoing objection is overruled, and the def't Railway Co. appeals to the Chancellor.)

Mr. MILLER: Compl't is willing to agree that Ex. #7 to Mr. Thompson deposition is a correct copy and for all purposes treated as having the same force and effect as the original if counsel for def'ts will, and assuming that they will not, insomuch as they fail not to assent.

75. I will ask you now Mr. Claggett, where Mr. Molloy's office is?

A. Ingalls Building, Cincinnati, Ohio.

76. That is about 2 blocks from where we are taking this deposition?

A. It is about one block and a little over.

77. I will ask you if you will apply to Mr. Moll-'s office for the original of Ex. #7 to be filed as requested before completing this your deposition?

(Def't C. N. O. & T. P. R'y Co. objects to a witness on the stand being requested or required to examine the files of other offices or make inquiries of other offices concerning documents of which he is not the custodian and with which the witness has indicated
75 himself to be wholly unfamiliar; and counsel for the def't R'y Company is unable from utter want of knowledge to agree that a typewritten paper produced by the other side is a copy of some existent paper.)

A. I shall have to ask to be excused.

78. Before asking to be excused you asked Mr. Pritchard who is representing the C. N. O. & T. P. R'y Co. for instructions a time or two didn't you?

A. No sir, I didn't ask him for instructions; I asked the question generally of your gentlemen, representing both sides as to what is customary under the circumstances to be done, and you all declined to give any instructions, stating it was up to me. Now I have answered you.

79. Now, as I understand, you decline to ask Mr. Molloy to let you have that letter and file it?

A. I do.

80. I- you thought that was not a genuine and correct copy that has been presented to you, would you decline still, Mr. Claggett?

A. That is a question that I am not prepared to answer.

81. In fact are you not quite sure that in so much as the exhibit to which I have called your attention corresponds exactly with the copy that is in your file——

A. I don't know that it does, nor have I stated that it does.

82. I have not quite finished my question yet. I say, are you not quite confident that the Exhibit to which I have called your attation insomuch as it corresponds with the copy that is in your file, is a genuine and correct copy?

A. Yes sir.

83. Now, what do you understand Mr. Proveleite to mean when he says in your Exhibit that there shall be a division allowing the N. C. & St. L. 50 cents and the remainder to the C. N. O. & T. P.; isn't that remainder to be 10 cts. per ton, or do you interpret it to be 20 cents?

A. I interpret this letter as advising Mr. Molloy that on a shipment from Cartersville and not from Emerson and Rogers,
76 Ga. that it would be proper to settle upon a basis of the total rate of 60 cts. per ton, allowing the line South of Chattanooga 50 cts. per ton.

84. What shipments are referred to in that letter, as you understand it?

A. The caption of the letter is "Ore from Emerson and Cartersville Ga. to Dayton, Tennessee".

85. What do you know of the notation at the bottom of the letter Ex #7 (Handing witness Ex. #7 to depo- of Robert Thompson)?

A. I don't know as I quite understand your question.

86. What do you know concerning that notation at the bottom; do you know the party to whom it is addressed, or do you recognize the initials?

A. I would rather you would make your question a little more specicic.

87. I will ask you if you know whether on this purported copy which is in your filed there appears this same notation at the bottom as appears on Ex. #7?

A. There does.

88. Who is Mr. Arbogast referred to in that foot note?

A. Mr. Arbogast was formerly employed in the General Freight Office of the C. N. O. & T. P. R'y in the capacity of Ass't Chief Clerk, and other subordinate capacities previously.

89. And whose are the initials "J. E. T. signed to that foot note?

A. They are the initials of J. E. Tilford who was a clerk in our office.

90. At or about the date when that letter was written?

A. I suppose so; he has not been there for some time, I don't know when he left.

91. As I understand, before the issuing of Tariff No. 7 which you filed in chief, there was certain correspondence touching the 60 cent rate between your line and the W. & A. or the N. C. & St. L.?

A. There was some correspondence between our line and the N. C. & St. L. concerning the 60 cent rate from Cartersville, Ga. but not from Emerson or Rogers, Ga.

77 92. And all carriers concerned concurred in that 60 cent rate before it was promulgated as to Cartersville?

A. The C. N. O. & T. P. Railway was the only carrier concerned as a concurring line, and our concurrence was shown on the Tariff.

93. What was necessary to be done for your road to be shown as a concurring line; what did you do; what was the course of conduct whereby your concurrence was signified? What did you do to signify your concurrence?

A. We had correspondence with the N. C. & St. L. in which we arranged for 60 cents form Cartersville to Dayton, Tenn. whereupon they issued the rate upon this Tariff and showen our line as a concurring line.

94. If it be a fact that your Company has settled with the N. C. & St. L. or the W. & A. whereby one or both of those lines has been paid 50 cts. per ton, on the ore shipped, to the Dayton Co. during the period in controversey, why did your line make such payment and settlement knowing that the Dayton Co. disputed the validity of that rate, if you know?

A. That is really a matter that I had no direct connection with I wunderstand, though, that the N. C. & St. L. R'y assessed its charges up to Chattanooga upon a basis of 50 cents per ton, which was its proposition of its lawfully published tariff rate of 70 cts. and that those charges allowed in the joint junction settlement at Chattanooga, between the N. C. & St. L. and the C. N. O. & T. P.

95. They were just allowex on paper, that is, balances were passed on the clearing house plant, as you understant it, Mr. Claggett?

A. I don't understand that it is allowed on paper; I understand it is an actual settlement; of course, it was made record of along with d-ubtless numerous other shipments but there was an actual interchange of money in those settlements.

96. Are you charged with the matter of settlements or the inspection of the balance sheets; have you access to them?

A. We have access to pretty nearly everything we want, but we don't have in the capacity of Freight Traffic official of the C.
78 N. O. & T. P.; officially, I have nothing to do with a detailed settlement between junction agents.

97. When you staten that this settlement in particular was made, you only stated hearsay?

A. I make that from an investigation and the correspondence that we have had in connection with that shipment. Our investigation shows that the W. & A. and the N. C. & St. L. was allowed 50 cents per ton to Chattanooga.

98. Who would have conducted that settlement personally?

A. I don't know who would. I had nothing to do with that. I am only telling you what my information developed, as to the details of it I am not competent to testify.

Cross-examination.

By Mr. JOSEPH BROWN, sol'r for N., C. & St. Ry. Co.:

99. As I understand the C. N. O. & T. P. signified its concurrence

in this Iron Ore Tariff No. 7 by accepting under the terms of the Tariff, but gave no notice of formal acceptance or concurrence?

A. I cannot say that by accepting traffic we may have had under that tariff we thereby accepted the Tariff: We as a matter of fact agreed upon the rates that were published in this Tariff which was sufficient authority for the N. C. & St. L. Ry. to publish the Tariff showing our line as a party, but I would not say that simply because some iron ore was delivered to us at Chattanooga, destined to Dayton, that that constituted an acceptance on our part specifically of this Tariff.

100. At any rate the N. C. & St. L. named you as participating carrier, and you undertook to handle traffic under the basis of that tariff?

A. We did.

101. You did that also upon the basis of the Iron Ore Tariff No. 8 in which you were also named as participating carrier?

A. Yes sir.

102. And you did not give the Nashville road or the Interstate Commerce Commission any notice that you refused to par-
79 ticipate in that Iron Ore Tariff #8?

A. No, we did not.

103. You have testified that the C. N. O. & T. P. learned of the establishing of this iron ore rate No. 8 in Feb'y when it received a copy of the Tariff?

A. No, I have not said that.

104. And that your copy of the Tariff showed that it was filed in the office of the Co. in Feb'y 1907?

A. I didn't say Mr. Brown that we learned of this rate in Feb'y when we received the Tariff. It is true we received the Tariff in our office in Feb'y along with may be hundreds and thousands of other tariffs, but the advance rate of 70 cents was not brought to our attention by the receipt physically of the tariff covering that rate, any more than I have brought to my attention any number of advance- in rates that might be incorporated in tariffs that come into the office by the hundreds.

105. Do I understand that you received the Tariff in Feb'y 1907?

A. We did, along with possiblu I don't know how many other tariffs.

103. I am not asking about other.

A. I only wanted to explain to you——

107. If you have a copy of that tariff which shows that it was received in Feb'y in the office of the General Freight Agent of the C. N. O. & T. P. and that it was marked filed in the office, I will ask you to make it an exhibit to this your deposition?

A. What? The Tariff itself?

108. Yes sir, if uou have no objection, I just want to show that it was stamped there. I would like to get it on record that that was received. There seems to be some misconstruction about it.

A. The copy that I have here, the only one I have, bears the stamping showing "General Freight Office Feb. 5, 1908" If I had

another copy of it, I would not mind your having this with that stamp on it, but I would like to retain that copy.

109. Well, I will ask that it be filed.

A. All right, I herewith detach from my file, and file the
80 Iron Ore Tariff you asked about with the stamp upon it reading Feb. 5, 1907, General Freight Office, as Ex. "H" hereto.

110. When tariffs are received in the office and marked "filed" they are kept and preserved?

A. They are now.

111. This one was?

A. This one was apparently, yes.

112. As a matter of fact, was that paper in the office at the time the General Freight Agent wrote the letter to the Agent of the Dayton Coal & Iron Co. at Dayton, in April 1907?

A. Presumably so.

113. Then Mr. Poveleite overlooked the fact that this joint rate established by the N. C. & St. L. had been received at your office when he wrote that letter?

A. I should say, on the other hand, that the N. C. & St. L. Ry. either overlooked or failed to notify us that they were going to advance that rate. In the common practice of carriers it was eminently proper that the N. C. & St. L. Ry. should have notified us of their intention to publish that advanced rate, and it is not an uncommon thing for rates, either advances or reductions, to be overlooked by interested lines, when they are put into a tariff and sent out in mere routine fashion along with hundreds and thousands of other tariffs, so that I don't know that Mr. Poveleite is necessarily chargeable with any very great oversight. The oversight lay in not notifying us in advance of the intention to increase that rate.

114. At the time he wrote that letter in April 18th 1907, however, to the Agent at Dayton, Tennessee, the 60 cent rate was not the legal rate, was it?

A. It was not.

Redirect examination.

By Mr. ROBERT PRITCHARD, sol'r for C., N. O. & T. P. Ry. Company:

1. Mr. Miller has asked you several questions concerning
81 certain typewritten papers which he has exhibited to you and which he says by his questions are copies of certain letters which are made exhibits to the deposition of Robert Thompson, a witness for the compl't in this case; do you know who made these copies?

A. I don't.

2. Did you ever see them before?

A. I didn't.

3. Are they carbon copies similar to the carbon copies you have, or are they made at different times?

A. Insofar as they are copies, at all; this letter appears to be not a carbon copy but copied entirely independent of the original.

4. Do you know how the compl't came into the possession of these copies or whether the compl't itself caused them to be made?

A. I don't know how they secured them.

5. In short, you know nothing about them?

A. I know nothing about them.

6. Mr. Miller also asked you concerning freight rates made or not made, as the case may be, by the N. C. & St. L. Ry. Company, to Rockwood and other points, have you any personal knowledge concernting the making of any such rates, or any personal recollection concerning them?

A. I have no personal recollection of the making of any rates from those N. C. & St. L. points to Rockwood.

7. And do you know whether or not the Rockwood furnaces used iron ore from Emerson, Cartersville or Rogers, Georgia?

A. I have no absolute knowledge, but I understand they are securing their ore from another source.

Recross-examination.

By Mr. W. B. MILLER, sol'r for Dayton Coal & Iron Co.:

1. Mr. Claggett, you have facilitiex here within easy access of verifying the purported copies of cprrespondence passing from and to the offices of the various officials, of the def't C. N. O. & T. P.
82 Ry. Co. that are exhibited to Mr. Tompson's deposition have you not?

A. Yes, in so far as I have seen those alleged copies; I have not read through all of them.

2. The originals, if there be such, are presumably on file here in Cincinnati, and within less than two blocks of where this deposition is being taken?

A. No, some of them are addressed to people outside of town.

3. I say, insofar as copies are on file *on* the office of the C. N. O. & T. P. Ry. Co. at all, they would be within *tow* blocks of where this deposition is being taken?

A. The copies, yes, sir.

4. Now, why is it that you refuse to ask Mr. Molloy to permit uou to file a copy of the letter which you were requested to prepare and file in my former cross-examination of you?

A. Because my jurisdiction of the C. N. O. & T. P. R'y is confined entirely to the Freight Traffoc Dep't and I have no jurisdiction over the Accounting department of which Mr. Molloy as comptroller is in charge.

5. I did not ask you to direct him to give it to you, I am asking that you request his to favor us with it, and I ask now if you decline to make that request and if so, why?

A. Because I question the propriety of my making that request.

(Counsel for the C. N. O. & T. P. Ry. Co. hereby wa-ve notice of the taking of the deposition of the proper custodian of the paper, and agree that Mr. Miller may take the deposition of Mr. Molloy or any person in his office, or any other agent, representative or employee of the C. N. O. & T. P. Ry. Co. today.)

Mr. MILLER: Will you request Mr. Brown to join in that waiver?

Mr. PRITCHARD: Mr. Brown is present, he can speak for himself.

Mr. MILLER: I will ask Mr. Brown who is present, if he will join in that waiver? Mr. Pritchard waives notice of record here to take the depositions of any one who *have* custody of certain papers that are attached as exhibits to Mr. Thompson's deposition. I
83 want to know if you will be as courteous as he is about it?

Mr. BROWN: Yes, if you will take the*y* and finish up by train time so I can get home tonight.

Mr. MILLER: Acting on the suggestion of Mr. Pritchard I give notice that at *shcu* an hour as suits the convenience of himself, and Mr. Brown, this afternoon, I would like to take the testimony of Mr. Poveleite.

The WITNESS: We cannot get him, he is out of the city, in the East.

Mr. MILLER: Mr. Poveleite, Mr. M. F. Molloy, -nd in case Mr. Poveleite is absent, of his Chief Clerk?

The WITNESS: He has not any Chief Clerk.

Mr. MILLER: Then whoever has the custody of the correspondence that is attached to the exhibit to Mr. Thompson's deposition.

Mr. PRITCHARD: I am willing to stay here with you and take those depositions until the train goes at 8.10 tonight, take them any hour that suits you.

(To the above offer by Mr. Pritchard, Mr. Miller made no response in the hearing of the Stenographer *th*aking the depositions.)

6. I will ask you Mr. Claggett, inasmuch as you say you have custody of the correspondence in Mr. Poveo*el*it-'s possession, if you will examine his files, and state if you find there the original of Ex. No. 8 attached to Mr. Thompson's deposition?

(Handing paper to witness.)

After the foregoing question was put to witness, an adjournment was taken for lunch, and so as to give Mr. Claggett opportunity to make the examination requested by the Question. After adjournment, upon re-convening, Mr. Claggett answered the foregoing question as shown below.

A. I find that Ex. #8 to the deposition of Robert Thompson, is substantially a correct copy of memorandum of Jan. 2/1909, to Mr. Poveleite from L. C. F.

84 7. Have you the original?

A. I haven't it with me, but I will tell you just wherein it differs; that word "and" does not appe.r in the original. That is the only difference; I checked it carefully, and another man read it to me. The only difference between Ex. #8 and the original from which it is copied is, that in the 5th line of the body of tje memo. the word "and" after 20 *cysye* bond does not appear in the original, while it is made to appear in the copy. It does not effect the sense at all.

8. I will ask you if you will file the original as an exhibit to your

deposition, unless adverse cou-sel will agree to treat this copy with your explannation as having the same force as the original, if filed?

Mr. PRITCHARD: I have no objections to the filing of the copy in lieu of the original, with the corrections stated by the witness, reserving any question as to the admissibility or relevancy of the letter.

9. Whose initials are the letters L. C. F. signed to this memo.?

A. They are those of Lee C. Finkle a former employe of the C. N. O. & T. P. Ry. Company.

10. In what capacity?

A. Clerk.

11. What claims were those referred to in the two last lines of this Exhibit No. 8 as G 45092 and 48[illegible]?

(Defendant C. N. O. & T. P. Ry. Company, objects to any explanation of the letter by the witness; foregoing objection is overruled, and the C. N. O. & T. P. Ry. Co. appeals to the Chancellor.)

A. I don't know what these claims were other than what is said in this memo. it speaks for itself.

12. You don't know who the claimants were?

A. I have no certain knowledge. It says in the memorandum what they were; which covered simialr cases. I have not investigated those particualr claims. I have no certain knowledge;

85 I didn't anticipate that you wanted that information.

13. Have you the correspondence file of Mr. Poveleite present?

A. I have one file; I don't know what file you refer to; there are a number of files.

14. Referring to the deposition of Mr. Robert Thompson, I will ask you to state whether or not you have investigated since the adjournment at noon to ascertain as to the genuineness of the copies of any of the various exhibits thereto, and if so, which of them; and in that connection, make any explanation that you like?

A. I checked the copy of letter of Sept. 4, 1909, from H. A. Poveleite to Mr. Geo. Greaves, shown as Ex. #6 to the deposition of Robert Thompson, and found it to be correct. I checked the copy of letter of Oct. 10, 1907, from H. A. Poveleite, to Mr. M. F. Molloy together with the copy at the foot thereof, from J. E. T. to Mr. Arbogast and found same to be a correct copy. I have already testified as to No. 8 covering the alleged copy of Memo. of Jan. 2, 1909, from L. C. F. to Mr. Poveleite and have explained the discrepancy between this alleged copy and the original. I failed to find original of memo. of Oct. 30, 1908, from H. C. C. to Mr. Burch, as covered by Ex. No. 9 in Robert Thompson's deposition. I find that the copy of letter of Nov. 5, 1908, from Geo. Graves, Freight Claim agent, to Mr. H. A. Poveleite, generzl freight agent, is inaccurate, in that the 5th line of the alleged copy *it* refers to rate of 77 cts. whereas the original mentioned rate *of* 70 cts.; the alleged copy in question is covered by Ex. No. 10 to Robert Thompson's deposition.

15. Whose initials are H. C. C. signed to Ex. #9 to Thompson's deposition?

A. They are the initials of H. C. Cooper, a clerk in our General Freight office.

16. Who is the Mr. Burch to whom that exhibit is addressed?

A. He was formerly an employee in our General Freight Office but is not now connected with our Co.

17. Was it part of Mr. Burch's duties to receive and Mr. Cooper's to write, memoranda of this nature?

86 A. It was.

(Counsel for the C. N. O. & T. P. Ry. Co. agrees that with the corrections stated by the witness the copies exhibited to and testified to by the witness shall be received with the same force and effect in evidence as if they were the originals, subject, however, to any exceptions which may be taken for relevancy or admissibility.)

And further deponent saith not.

FREDERICK D. CLAGGETT.

Subscribed and sworn to before me this 27th day of August, 1912.

EUGENE BRUSEMAN, *N. P.*

87 Copy.

Sol 555-C
Cy Rate 244

July 27, 1908.

Iron Ore from Cartersville and Emerson, Ga., to Dayton, Tenn.

Personal.

Mr. Chas. Barham, G. F. A. Nashville, Chattanooga & St. Louis Ry., Nashville, Tenn.

DEAR SIR: Will you please refer to your file 2739-S, February 22, 1906, regarding rate of 60¢ per ton on iron ore from Cartersville, Ga., to Dayton, Tenn. In line with this correspondence there was issued by you February 23, 1905 Rate Issue 24262, amendment No. 9 to I. C. C. 941-A, carrying rate of 60¢ per ton. This rate was subsequently carried in your Iron Ore Tariff I. C. C. 1295-A, issued August 18, 1906, and again in I. C. C. 1297, effective August 31, and contained in I. C. C. 1314-A issued October 31, 1906. Based on this, the Dayton Coal & Iron Co. arranged contract with the mines named for a large supply of iron ore, which began to move early in 1907.

I find that without notice or reference to correspondence your office issued February 2, 1907, I. C. C. 1351 cancelling 1314-A and in lieu of the 60¢ rate to Dayton put in rate of 70¢. No notice of this itself being received at this shipper's or consignees, also; the tariff itself being received at this office with a lot of others making it impracticable, of course, to check up and ascertain all changes made. I also find that we received Division Basis 3025 corrected,

showing divisions from Emerson and Cartersville to Chattanooga 40¢ beyond, 20¢ on business to Dayton, Tenn. This division sheet has never been canceled by any division sheet received at this office.

It would certainly see-, that we are justified in expecting our attention called to the fact that you intended to withdraw the 60¢ rate in view of the fact it was issued in line with correspondence which we took up with you; and having no notice of your intention, we quoted the 60¢ rate early in 1907 to the consignees and they went ahead with the contract. I should like to have promptly your suggestions as to how this matter can best be adjusted, more particularly in view of the fact that the case is likely to be taken into court before the consignee will pay the additional amount.

You understand, of course, that from our record of the division sheets we would naturally understand your line is still accepting 40¢ per ton to Chattanooga out of the through rate published.

Please let me have immediate reply.

Yours truly,

(Signed) H. A. POVELEITE,
General Freight Agent.

Dict.

88 EXHIBIT "B" TO DEPOSITION OF F. D. CLAGGETT.

88a Cincinnati, New Orleans & Texas Pacific Railway Co.

Office of Vice President.

T. C. Powell, Vice President, Cincinnati, O.

NEW ORLEANS-CINCINNATI, May 4, 1909.
1114-A.

Dayton Coal & Iron Company, Cincinnati, Ohio.

Relations with Dayton Coal & Iron Company.

DEAR SIR: Under date of February 20th, Mr. Whitaker sent me copies of correspondence in regard to certain alleged overcharge claims on shipments of ore to Dayton.

Mr. Biles has gone fully into this matter, and I attach copy of his memorandum of May 1st. Won't you kindly read same and advise me further?

Regardless of what our own views may be in the matter, the legal tariff is the tariff published by the initial line and under the law we are required to enforce collection of freight charges on that basis.

Yours truly,

(Signed) T. C. POWELL,
Vice President.

k5.

89 EXHIBIT "C" TO DEPOSITION OF F. D. CLAGGETT.

90 EXHIBIT "D2" TO DEPOSITION OF CLAGGETT.

CINCINNATI, OHIO, May 1st, 1909.

Sol-555—C.

Relations With the Dayton Coal & Iron Co.

Mr. POWELL: In connection with the correspondence your file III-4-B April 23, and returning papers received with yours of Feb. 22nd. Early in 1906, the Dayton Coal & Iron Co. asked us to arrange for rate on ore from Cartersville Ga. to Dayton Tenn. We took it up at once with the N. C. & St. L. and Seaboard Air Line, but the latter declined to join in a reduction in the rate, while the N. C. & St. L. published effective Feb. 23, 1903, rate of 60 cts. per ton, taking 40 cts. to Chattanooga allowing 20 cts. North.

No mention was made at this time to the rate from Emerson Ga. although the outstanding account of the Dayton Coal & Iron Co. covers movements both from Emerson and Cartersville.

In August 1906 the N. C. & St. L. superseded their original tariff covering this rate, by issuing Ore Tariff No. 5. Mr. Knox then general fr't agent, specifically called attention to this supersedure, although the rate was not changed, and in letter under date of Aug. 7, 1906, asked specifically for receipt of the tariff.

No further correspondence was had in connection with the question until April 1907, at which time the D. C. & I. Co. wrote our agent at Dayton, (H. H. Taylor) asking for the rate on ore, from Cartersville; the agent at Dayton then asked this office for the information. Our clerk Kerr answered the agent at Dayton, that the rate on ore from Cartersville to Dayton, was carried in our Raw Material Tariff R 196, which showed the rate to be 60 cts. per ton; in the meantime Mr. Whitaker, of the Cincinnati Office of the D. C. & I. Co. claims that he took up with this office the question of securing cars to handle a movement of ore, and claims he also took it up with the N. C. & St. L. people. Though this question of car supply does not appear to have been handled by correspondence.

On April 23, 1907, we received request from the agent at Dayton to quote rate on ore from Emerson, Ga. to Dayton, and reply
91 was made also by our clerk Kerr quoting 60 cts. per gross ton; made 40 cts. to Chattanooga. 20 cts. north; and the agent was requested to advise if the rate would be used, but no reply was given by him. We are unable to locate where the Clerk got his authority for quoting 40 cts. proportion from Emerson to Chattanooga.

Our attention was not called to the matter further until June 26, 1908, when Mr. Molloy advised under his file F-222 of that date, that the D. C. & I. Co. had deducted $1194.43 from their settlement

on account of the difference in the rate on ore. We wrote the D. C. & I. Co. advising them that the N. C. & St. L. had issued rate of 70 cts. from Cartersville and Emerson to Dayton, and that we could not undertake to protect other than this legal rate.

The whole difficulty appears to have arisen from the fact that when the N. C. & St. L. without any advise of their intended action issued iron ore Tariff No. 8 effective March 5, 1907, advancing the rate from Cartersville, and Emerson to Dayton to 70 cts. per ton. The tariff was received through the usual course and referred to the desk in charge of the clerk previously mentioned, who appears, however, to have never checked the tariff, but simply put it into the foreign file case, allowing our Raw Material Tariff to remain unchanged, whereas he should have checked it and made necessary correction and given proper notice of the change on the rate.

The Dayton Coal & Iron Co. in the meantime insist that the quotation, above referred to, was in the nature of a contract, necessitating our applying the 60 ct. rate, from both Emerson and Cartersville. I have in my letters to Mr. Whitaker pointed out that the law does not permit application of other than legally published rates and we must necessarily collect on basis of 70 cts. per ton.

Although Mr. Whitaker claims he took the matter up with us and the N. C. & St. L. in April 1907 for car supply, and in this way giving us notice of the movement, the Comptroller's records indicate that the disputed items cover the months of August, September, October, November and Dec. 1907 and Jan. 1908.

92 Without attempting in any way to condone the error of the clerk making the erroneous quotation in April, it would seem from this that the D. C. & I. Co. are insisting on the technicality of the quotation and endeavoring to enforce settlement on the 60 ct. basis.

The further fact that the clerk making the error was relieved before this trouble was brought to our attention, in no way helps out the matter of settlement with the D. C. & I. Co.

The refusal of the W. & A. to recede from their position in advancing the proportion to Chattanooga from 40 cts. to 50 cts. per ton, and the further fact that the rate was not used by the D. C. & I. Co., from April up until Aug. 1907, are also circumstances that make it almost impracticable to adjust this matter by a reparation claim before the Commission.

G. P. B.

92*a* FEB. 10th, 1908.

Mr. Sam Nelson, Agent, City.

DEAR SIR: Referring to yours of this date with the accompanying papers, the rate we have on ore from Emerson as per your Mr. Taylor's letter of April 25th, is 40 cents and 20 cents or a total of 60 cents. We have been shipping this ore all along on the understanding that the rate was 60 cents and we have never been advised of any change, otherwise we should have certainly discontinued

shipments. Under the circumstances we do not see our way to make any change in our records.

Yours truly,

DAYTON COAL & IRON CO. LTD.

(Signed) ROBERT THOMSON, *Cashier.*

93 EXHIBIT "E" TO DEPOSITION OF F. D. CLAGGETT.

93a DAYTON, TENNESSEE, Feb. 10th, 1908.

Mr. Rob't Thomson, Cashier the Dayton Coal & Iron Co., Dayton, Tenn.

DEAR SIR: I am handing you herewith Claims G45092 and G60458 covering adjustments on ore coming from N. C. & St. L. stations to us. You will note that the accounting department has billed these claims back to me, this will make it necessary for me to recharge the account of the Dayton Coal & Iron Co. until you can make up new papers and statements, each covering separately shipments from Cartersville and Emerson, as the rates from those points are different. See Mr. Provelite's letter attached also correspondence from N. C. & St. L. Ry. bearing on the same subject. Please have new statement made up, one for Emerson Ore, and one for Cartersville ore, using through rate of 70 cents per ton from Emerson and fifty cents per ton from Cartersville, allowing in each statement the N. C. & St. L. 50 cents, the C. N. O. & T. P. 10 cents on Cartersville and 20 cents on Emerson.

Yours truly,

SAM NELSON.

Copy.

Claim G $341.54.
Claim G $852.89.

94 EXHIBIT "G" TO DEPOSITION OF F. D. CLAGGETT.

95 *Deposition of John V. Bryant. Filed Sept. 5" 1912.*

JOHN V. BRYANT, being first duly sworn, was examined and deposed and testified as follows, towit:

Direct examination.

By Mr. ROBERT PRITCHARD, sol'r for C., N. O. & T. P. Ry. Company:

1. Mr. Bryant, what connection have you with the def't C. N. O. & T. P. Ry. Co.?
A. I am the Chief Freight Clerk in the Comptroller's office.
2. How long have you been in that position?
A. Over 6 years.

3. Did you occupy that position in Feb'y 1907?

A. Yes sir.

4. And have you since continued to occupy it?

A. Yes sir.

5. Are you familiar with the manner in which the freight charges against the Dayton Coal & Iron Co. for shipments of iron ore from Cartersville Ga. to Dayton Tenn. were handled?

A. Yes sir.

5. At waht rate per ton were the bills made out against the Dayton Coal & Iron Co.?

A. 70 cts. per ton of 2240 pounds.

6. In what amnner were the freight charges paid by the Dayton Coal & Iron Co. to the C. N. O. & T. P. Ry. Co.?

A. The representative at Dayton, of the Dayton Coal & Iron Co. made out a statement at the end of each month of the amount of freight due the C. N. O. & T. P. Railway. Tgis settlement was sent in by the agent of the Railroad co. for credit and we took a 3 months' note from the Dayton Coal & Iron Co.

7. Do you know and can you state whether or not the Dayton Coal & Iron Co. claimed a different rate from that at which the fteight was billed?

A. They claimed a rate of 60 cts. per ton, and made the
96 settlement with the agent at that rate leaving a balance of 10 cts. per ton outstanding.

8. Do you know whether or not the C. N. O. & T. P. Ry. Co. from and after March 5, 1907, charged against the Dayton Coal & Iron Co. a uniform rate of 70 cts. per ton on iron ore shipped from Cartersville, Emerson and Rogers, Ga. to Dayton, Tenn?

A. The bills were rendered against the Dayton Coal & Iron Co. at the rate of 70 cts. per ton.

8. As I understand you the amount paid or settled for by the Dayton Coal & Iron Co. was at the rate of 60 cts. per ton?

A. Yes sir.

10. When iron ore freight was delivered by the C. N. O. & T. P. Ry. Co. to the Dayton Coal & Iron Co. and when the Dayton Coal & Iron Co. paid 60 cts. instead of 70 cents the rate charged, how was the difference handled?

A. The agent made out a relief claim and took a receipt from the Dayton Coal & Iron Co. for the difference of 10 cents a ton; but other differences arose from difference in weight.

11. Were those receipts signed by the Dayton Coal & Iron Co.?

A. They were signed by the Dayton Coal & Iron Co. per Mr. Thompson; I believe his title is Cashier.

12. Have you in your possession the receipts covering the transactions involving the difference between the 60 cent and the 70 ct. rate?

A. I have.

13. I will ask you to file those receipts, numbering each one of them, as exhibits to your deposition, stating the date of each receipted bill?

A. July 22, 1907 $423.46 which I file as exhibit No. 1 to my

deposition, Sept. 28, 1907 $49.04 which I file as Exhibit No. 2 to my deposition; Sept. 28, 1907, $497.22 which I file as Ex. #3 to my deposition; Oct. 28, 1907 $852.89 which I file as Ex. #4 to my deposition; Feb'y 28, 1908 $16.38 which I file as Ex. #5 to my deposition; Nov. 30, 1907 $609.14 which I file as Ex. #6 to my deposition; Jan. 25, 1908 $289.10 which I file as ex. #7 to my deposition; one without date $277.19 which I file as Ex. #8 to
97 my deposition.

14. I observe that these receipts contain on their face statements to the effect that the refund is made with the understanding that if the N. C. & St. L. Ry. agrees to the overcharge, that the amount of that line's proportion shall be charged back to the Dayton Coal & Iron Co.; was this and like clauses contained in these receipts in the receipts at the time they were signed?

A. So far as I know they were; I didn't take the receipts.

15. Did they come into your possession with those clauses in them?

A. They came into my possession in the way they now stand, yes sir.

16. Did the N. C. & St. L. Ry. Co. ever agree that the amount deducted from the bills should be allowed to the Dayton Coal & Iron Co.?

A. They did not.

17. State whether or not the N. C. & St. L. Ry. Co. always insisted that the rate should be 70 cents instead of 60 cents?

A. Well, I don't know whether I can answer that or not. Shipments were billed at that rate and they received their proportion of it and they declined on the claims to refund.

18. State whether or not the deductions shown by these receipts represent the difference between the rate of 60 and 70 cents or in other words, 10 cents per ton?

A. It represents that difference.

19. I notice in the bills that the freight rate charge is 70 cents per ton, and the figures extended or run out in the bills represent that rate; the receipted bill signed Dayton Coal & Iron Co. by Robert Thompson, Cashier, shows substantially that the Dayton Coal & Iron Co. had received such a sum of money "in full satisfaction and settlement of all claims and demands which I may have against said company, for the overcharge, loss damage or injury referred to in above account?"

Now, state whether or not any money was actually refunded to the Dayton Coal & Iron Co. or whether or not that merely represented the difference between the 60 cents and 70 cents and was intended as a statement that the Dayton Coal & Iron Co. had not in fact paid or agreed to pay that amount?

98 (Above question is excepted to, because leading and suggestive exception overruled, and appeal taken to the Chancellor.)

A. There was no money represented by the receipt, and that the receipt was given to cover the difference between the amount way-

billed at 70 cts. per ton and the settlement in the monthly account at 60 cts. per ton.

20. State whether as a matter of fact the Dayton Coal & Iron Co. repaid or refunded in cash any sum of money whatever to the C. N. O. & T. P. Ry. Co.?

A. They did not.

21. State whether or not as a matter of fact, the Dayton Coal & Iron Co. paid to the C. N. O. & T. P. Ry. Co. freight at the rate of 60 cts. or at the rate of 70 cts. per ton?

A. It paid at the rate of 60 cts. per ton.

22. State whether or not as a matter of fact the manner of handling this transaction was resorted to for the purpose of reserving the right to demand and collect the 10 cts. if it should appear to be legal?

(The above question objected to, because leading and suggestive, exception overruled, and appeal taken to the Chancellor.)

A. That is as I understand it.

23. State whether or not the N. C. & St. L. Ry. Co. received and collected 50 cts. per ton on the shipment billed to the Dayton Coal & Iron Co. at 70 cts. per ton on which the Dayton Coal & Iron Co. paid 60 cts. per ton?

A. The N. C. & St. L. Ry. got 50 cts. a ton at Chattanooga on all the shipments.

24. Did or did not, the N. C. & St. L. Ry. Co. receive any more as its proportion of the freight charges at the 70 cent rate than it did at the 60 cent rate?

A. Its proportion was 20 cents a ton in either case.

25. As I understand you, whether the rate was 60 cts. or 70 cts. the proportion of the C. N. O. & T. P. Ry. Co. was 20 cts. per ton?

A. Yes sir, that is correct.

99 Cross-examination.

By Mr. W. B. MILLER, Sol'r for Dayton Coal & Iron Co.:

1. Who was your immediate superior in Feby. 1907 and for 2 years thereafter?

A. Mr. M. F. Molloy, comptroller of the C. N. O. & T. P. ry. company.

2. Are you still filling the same position in Mr. Molloy's office that you were then?

A. I am.

3. Are you acquainted with Mr. Robert Thomson, Cashier? Dayton Coal & Iron Co.?

A. By hearsay. I know what position he occupies.

4. I mean are you personally acquainted with him?

A. No sir.

5. Did you ever see him to your knowledge?

A. I think I have seen him at Dayton, but I couldn't say. I used to be traveling auditor, and was out on the road a great deal but since I came into the office I have not been down the line.

6. When did you cease your duties as Auditor?

A. Traveling auditor? I think it was, if I am not mistaken, 1906—May.

7. You don't mean that you saw Mr. Thompson execute any of the papers which you filed purporting to be receipted?

A. Nor sir.

8. In truth as you were not present when those exhibits were executed, you don't know of your own knowledge, what the intention of the parties was at the time, do you?

A. I know that that was carrying out our system of accounts.

9. Do you mean that your company is accustomed to doing business in the way that you have shown in your examination-in-chief?

A. Well, we require our agents to get a receipt for items that they want a clearance on.

10. But my question is, whether you have a personal knowledge as to what passed between the agent of your company, at Dayton Tenn. and the representative of the Dayton Coal & Iron Co. at the time these receipts were executed or purported to have been
100 executed?

A. Well, I have no personal knowledge, as I was not there.

11. Do you have any personal knowledge of the agreement if one was made, between your company and the Nashville, Chattanooga & St. Louis Ry. Co. as to the distribution of the 60 cts. that appears to have been paid by the Dayton Co. on account of these freight shipments?

A. I know the published divisions that were made of the 70 cent rate and I know that the N. C. & St. L. never refunded any part of the 50 ct. a ton which they received.

12. How do you know that the N. C. & St. L. received a cent?

A. Because our agent p-id it in weekly settlements.

13. How do you know that?

A. We have the drafts on file that were paid.

14. Then when you stated that this amount was paid, you based your statement on the contents of these drafts and on what has been represented to you, not from what you know personally, is not that true?

A. Well, I have charge if the accounts over there and settlements of the agents; of course, if you have to have a personal account of that, you would have to get the man from the Chattanooga station.

15. But if I understand it correctly, Mr. Bryant, there is supposed to have been a settlement or balance of accounts between the representative of your company and the representative of the N. C. & St. L. Ry. Co. at that points touching these ore shipments and the division of the 60 cents per ton that the Dayton Co. paid on account of the same?

A. The N. C. & St. L. Ry. in the ordinary and customary course of business interchange at Chattanooga, delivered us the cars of ore for Dayton with the expense bills with their charges assessed at 50 cts. per ton and these charges were billed out by our agent as advance charges on the way bills, and in the regular and ordinary course of business a settlement of all business interchanged, that is what we received from the N. C. & St. L. and what we delivered to the N.

C. & St. L. is made once a week, that is to include the 1st to
101 to the 7th then th- 8th to the 14th and so on four settlements a month, and whichever way the balance is due, the other line draws a draft on its Treasurer and deliveres it to the agwnt of the other line, in payment of the entire week's interchange.

16. Sometimes the balance is in favor of your line, and sometimes it is in favor of the other line?

A. Yes sir, just according to the fluctuations in the business.

17. Then I say, that your statement that a settlement was made between your line and the N. C. & St. L. as respects this 60 cents per ton paid by the Dayton Co. whereby the N. C. & St. L. is credited with 50 cts. per ton on these shipments is based entirely and purely upon information received by you and not from your personal knowledge of the transaction, now, isn't that correct?

A. Well, I didn't see the transaction, make it up—but I know just as well as I am sitting here that a settlement was made.

18. But you know that was made like you know hundreds of otgers were made between your line and that *that* you did not personally make?

A. Yes sir.

19. That is because your various agents at these various points transmit purported settlements which you pass as being correct?

A. The settlement is signed by both agents as being cirrect.

20. And transmitted to your office?

A. Yes.

21. So, when you answered in chief tha- the N. C. & St. L. Ry. had declined and refused to accept less than 50 cts. per ton, on this ore, your statement was based purely on what was represented to you and not of your own personal knowledge and negotiations, isn't that correct?

A. Well, it is on our records. It shows that we have not collected anything back from them.

22. I will get you to examine exhibits No. 7, 12 and 13 to
102 the deposition of Robert Thompson, and refer to the files of your chief, Mr. Molloy, and see whether or not the originals of those various exhibits are on file there, and if they are, produce and file the same as exhibits No. 9, 10 and 11 to this your deposition?

A. With reference to the Ex. #7 to the deposition of Robert Thompson, being letter from H. A. Poveliete to M. F. Mplloy, dated Oct. 10 1907 file 53-729 L claim G 45082, 48966; subject, "Ore from Emerson and Cartersville, Ga. to Dayton, Tenn." I will look for this and if I can possibly find it, I will attache it to my deposition as exhibit Np. 8 thereto. With reference to exhibit No. 12 attached to the deposition of Mr. Thompson, being a letter dated Dayton, Tenn. July 21, 1906 addressed to M. F. Molloy, Comptroller, Cincinnati, Ohio and signed "S. Nelson". I will search for this and if found attach it as Exhibit No. 10 to this my deposition. With reference to exhibit No. 13 attached to the deposition of Robert Thompson, being a letter dated Nashville, Tenn. March 17th 1908, addressed to M. F. Molloy, Auditor, Cincinnati, Ohio and signed by S. D. Cowden, Claim agent, his file 4788, returning claim G-51931, I will

search for this paper, and if found, will attach it to my deposition as Exhibit No. 11 thereto.

23. Who is, or who was, Mr. S. D. Vowden and for what system was he claim agent?

A. S. D. Vowden was the claim agent of the N. C. & St. L.?

24. And who was Mr. Geo*r*ge Greaves in September 1908?

A. He was the freight claim agent of the Cincinnati, New Orleans & Texas Pacific Ry.

25. With offices at Cincinnati, Ohio?

A. Yes sir, it was a branch of Mr. Molloy's office. Mr. Molloy was his superior.

26. Then I will ask you to examine the files in Mr. Molloy's office, and ascertain if the original of Ex. #11 is on file there; and if so, produce and file it as exhibit No. 12 to your deposition?

A. Ex. #11 attached to the deposition of Robert Thompson is a letter dated Chattanooga Tennessee, September 23, 1908 sub-
103 ject claim G 51931 addressed to Mr. George Greaves. F. C. A. Cincinnati Ohio signed H. H. Tayl*p*r, H. Age*m*t, and if found will attach*e* it to my deposition, as exhibit No. 12 thereto.

(Counsel for C. N. O. & T. P. Ry. Company agrees that the witness may go to Mr. Moll*p*y's office and see if he can*e* find the papers mentioned; but is unwilling to agree to allow the papers to be filed after the deposition has closed.)

The witness now went to make search for the papers and after so doing he returned and further answered as below:

The WITNESS: Here is original of letter dated Octo*n*er 10 1907, being exhibit No. 7 to the deposition of Robert Thompson, which I now make Exhibit No. 9 to this my deposition. With reference to Exhibit No. 13 of Robert Thompson, I file here with original letter dated Nashville, Tennessee, March 17, 1908, which I file as Exhibit No. 11 hereto; with reference to exhibit No. 11 to the deposition of Robert Thompson, herewith I file original dated Chattanooga Tenn. Sept. 23, 1908, addressed to Mr. George Greaves F. C. A. Cincinnati Ohio signed H. H. Taylor, H. Agent which I submit as exhibit No. 12 to this my deposition. With reference to exhibit No. 12 to the deposition of Robert Thompson, being letter dated July 21, 1908 addressed to M. F. Molloy, and signed S. Nelson, Agent, Dayton, I made search for same and have not found the original letter.

27. I understand you have not completed that search; if you find it later, will you attach*e* it to this deposition?

A. If found, I will attach it, I didn't find it in the place in date order where it ought to be, and it doesn't mention*al* any claim number, so it is not likely to be anywhere else.

(The witness later reported that after additional search he was still unable to find the above letter.)

And further deponent saith not.

JOHN V. BRYANT.

104 Subscribed and sworn to before me this 27th day of August, 1912.
EUGENE BRUSSMAN, *N. P., Hamilton County, Ohio.*

EXHIBIT No. 1 TO DEPOSITION OF J. V. BRYANT.

103*a*

C. N. O. & T. P. R'y To Dayton Coal & Iron Co. Ltd. Dr.
Dayton, Tenn.

For A/c on freight in transportation from Chattanooga to Dayton, Tenn., consigned to Dayton Coal & Iron Co.

Refined ore a/c ore May & June, 1907. Dist attached	890	41456	42346

This refund made subject to approval of connection south Chatta.

Received July 22, 190 — of the Cincinnati, New Orleans & Texas Pacific Railway Company the sum of Four hundred and twenty — 46/100 dollars ($423.46) in full satisfaction and settlement of all claims and demands I may have against said company for the overcharge, loss, damage or injury referred to in above account.

ROBERT THOMPSON, *Cashier.*
For DAYTON COAL & IRON CO.

104*a*

C. N. O. & T. P. R'y To Dayton Coal & Iron Co. Dr.
Claim No. F168. Dayton, Tenn.

For overcharge on fr't in transportation from Cartersville, Ga., To Dayton, Tennessee, consigned to Dayton Coal & Iron Co.

various	ore	3 96	45 08	49.04

This refund is made with the understanding that if the N. C. & St. L. R'y fail to agree to the O/C the amount of that lines' proportion will be charged back to the Dayton Coal & Iron Co.

(usual receipt for 49.04)

105 EXHIBIT No. 2 TO THE DEPOSITION OF J. V. BRYANT.

106

C. N. O. & T. P. R'y
Claim No. F167

To Dayton Coal & Iron Co. Dr.
Dayton, Tenn.

For overcharge on fr't in transportation from Chattanooga to Dayton, consigned to Dayton Coal & Iron Co.

various *various* ore 38 28 458 94 497.22

The refund of the overch*rrag*e in advan*c*d charges made herein is made with the understanding that if the N. C. & St. L. R'y Co. refuse to allow it, it will be recharged to the Dayton Coal and Iron Co.

(usual receipt for $497.22)

106*a*

C. N. O. & T. P. R'y Co.
Claim No. 171-F

To Dayton Coal & Iron Co. Dr.
Dayton, Tenn.

For overcharge on freight in transportation from N. C. & St. L. R'y to Dayton, Tenn., consigned to Dayton Coal & Iron Co.

Various Ore stat-s statement billing attached 55 65 797.25.

This refund is made to the Dayton Coal and Iron Co. for advance charges with the understanding that if the N. C. & St. L. R'y fail to agree to allow it, it will be recharged to the Dayton Coal & Iron Co.

(Usual receipt for $852.89).

107 EXHIBIT No. 3 TO THE DEPOSITION OF J. V. BRYANT.

107*a* EXHIBIT No. 4 TO THE DEPOSITION OF J. V. BRUANT.

107*b*

DAYTON, TENN.

C. N. O. & T. P. R'y Co. to Dayton Coal & Iron Co. Dr, o/c on freight in transportation from N. C. & St. *O*. Stations to Dayton, Tenn., consigned to Dayton Coal & Iron Co. Oct. 29. 1228 50

various ore 308100 20 2752 70.00

This refund is made subject to acceptance by —— ——

(Usual receipt for $16.3.)

108 EXHIBIT No. 5 TO THE DEPOSITION OF J. V. BRYANT.

108*a*

Claim No. 2294. DAYTON, TENN.

C. N. O. & T. P. R'y to Dayton Coal & Iron Co., Dr. For o/c on fr't in transportation fro-, N. C. & St. L. R'y to Dayton, Tenn., consigned to Dayton Coal & Iron Co. various Ore Tag 2460 97199 251556 2487.50

60914 overcharge refunded on this date Nov. 30, 1907, on this freight bill o/c 4380 565 34 609.14.

Billed in Nove. 30, 1907.

Refund on o/c of foreign line proportion made with the understanding that if not agreed to amount will be recharged to the D. C. & I. Co.

(Usual receipt for $1609.14.)

109 EXHIBIT No. 6 TO THE DEPOSITION OF J. V. BRYANT.

109*a* DAYTON, TENN.

C. N. O & T. P. Ry., to Dayton Coal & Iron Co. Dr. o/c on fr't in transportation from N. C. & St. L. Stations to Dayton, Tenn. consigned to Dayton Coal & Iron Co.

Various Ore 289.10

The within $289.10 is paid the Dayton Coal and Iron Co. with the understanding it will be charged back to their account if same is not agreed to by foreign line interested.

Paid claim billed in *H*an. 25, 1908.

(Usual receipt for $289.10.)

110 EXHIBIT No. 7 TO THE DEPOSITION OF J. V. BRYANT.

110*a* DAYTON, TENN.

C. N. O. & T. P. Ry. Co., to Dayton Coal & Iron Co. Dr. for o/c on fr't in transportation from Chattanooga to Dayton, Tenn. consigned to Dayton Coal & Iron Co.

N. & C.

Various ore 48790 25221

Paid claim overcharges as per statements attached are allowed subject to corrections by lines interested.

Billed in —— ——.

Overcharges — same as above.

(Usual receipt for $277.1.)

111 EXHIBIT No. 8 TO THE DEPOSITION OF J. V. BRYANT.

111*a* (Usual Railway Letterhead.)

Freight Department.

CINCINNATI, Oct. 10, 1907.

Sol. 53-729-L
Claim G-45092
48966

Ore from Emerson and Cartersville, Ga., to Dayton, Tenn.

Mr. M. F. Molloy, Comptroller.

DEAR SIR: Herewith papers in the above claims.

I note that these claims have been paid on basis of 60 cents per ton. It woll be proper for you to protect this rate on shipments coming from Cartersville which is in line with our R-196, I. C. C. 3269. This rate should divide by allowing the N. C. & St. L. to our tracks at Chattanooga 50 cts. per ton, C. N. O. & T. P. accepting the balance.

As we did not publish through rate from Emerson in above issue, rate of 70 cents per ton as shown in N. C. & St. L. Ore Tariff should apply, which divides by allowing the N. C. St. L. 50 cents to our tracks at Chattanooga, 20 cents to C. N. O. & T. P.

We will arrange to correct our issue to basis of 70 cents from Cartersville.

Yours truly,

H. A. POVELEITE, *G. F. A.*

Jet-H-9

112 EXHIBIT No. 9 TO THE DEPOSITION OF J. V. BRYANT.

112*a* Nashville, Chattanooga & St. Louis Ry.

NASHVILLE, TENN., March 17, 1908.

4788-K

Mr. M. F. Molloy, Aud., Cincinnatti, O.

DEAR SIR: I herewith return your claim G-51931 covering alleged overcharge on shipment of iron ore from Emerson and Cartersville, Ga., to Dayton, Tenn. Our iron ore tariff #8 effective March 7th 1907 names rate of 70 cents, divided to Chattanooga 50 cts. beyond 20 cts. per ton. This tariff also states that the minimum charge is to be figured on the capacity of the car 10% more or less. We have no authority for the rate of 60 cts. as claimed by claimants, and cannot apply their actual weights as shown. If claim is

amended to the proper basis and any overcharge is shown by our line, we will authorize.

Yours truly,

S. D. COWDEN,
Claim Agent.

PHM-a

113 EXHIBIT No. 11 TO DEPOSITION OF J. V. BRYANT.

CHATTANOOGA, TENN., Sept. 23, 1908.

File D—48.

Claim G—51931.

Mr. George Greaves, F. C. A., Cincinnati, Ohio.

DEAR SIR: In reply to yours next attached, and returning all papers herewith, beg to advise that I have no Rate Sheet to cover this rate at time shipments moved. However, rate sheet R-935 effective 10/30/07, which was amendment No. R-196 effective 1/26/07 quoted this rate. R-196 is not in my file.

Yours truly,

(Signed) H. H. TAYLOR, *Agent.*

114 EXHIBIT No. 12 TO DEPOSITION OF J. V. BRYANT.

115 STATE OF OHIO,
Hamilton County, ss:

I, Douglas A. Brown, do hereby certify that as an Expert Shorthand Reporter, I correctly took down and there after correctly transcribed the questions and answers as propounded to and answered by them and that the said transcript of said depositions of the witnesses aforesaid was not altered by me after being reduced to typewriting.

I further certify that I am not interested in this case, nor kin or counsel to either of the parties, but as above stated that I correctly took the testimony of the witnesses and correctly reduced my shorthand notes thereof, to typewriting to the best of mys skill and ability.

DOUGLAS A. BROWN,
Shorthand Reporter, Cincinnati, Ohio.

August 27, 1912.

116 The depositions of C. Gribble and H. L. Haynes, taken by consent of parties in behalf of defendant Nashville Chattanooga & St. Louis Railway Co. on Sept. 9th, 1912, at the offices of Pritchard, Allison & Lynch, Chattanooga, Tennessee, in the presence of solicitors for all parties.

Deposition of C. Gribble. Filed Feb. 20, 1913.

The first witness C. GRIBBLE, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. JOE BROWN:

1. Please state your age and place of residence?
A. Gribble, Acworth, Ga. 40 years of age.
2. What position, if any, do you hold with the N. C. & St. L. R'y?
A. I am agent.
3. State where.
A. At Acworth Ga.
4. State whether or not you were at one time agent for the Co. at Emerson, Ga. and if so, during what period of time?
A. I was agent at Emerson, from I think it is about Sept. 1906 until April 14, 1909.
5. On what railroad is Emerson, Ga. located?
A. Located on the Western & Atlantic—operated by the N. C. & St. L.
6. As agent for the Co. at that point, state whether or not you had charge of the rates and schedules kept in the office?
A. Yes sir, I had charge of the tariffs and rates.
7. State whether or not it was a part of your business to quote rates to prospective shippers.
A. It was, upon application.
8. Do you have any recollection of shipments of iron ore from Emerson to the Dayton Coal & Iron Co. at Dayton during
117 1907 and '08?
A. Yes sir. I remember of having movements of ore from that point to Dayton.
9. State whether or not, you, as agent, handled the shipments and billed them out?
A. I di-.
10. Do you know what the rate was on iron ore from Emerson Ga. to Dayton Tenn. prior to March 1907?
A. As best I remember, it was 60 cts.
11. After March 1907 what was it?
A. It was increased to 7 cts.—that is per gross tons.
12. Did you keep a copy of the schedules or rates showing this tariff in the office there at Emerson?
A. I did.
13. State whether or not you received at that office and kept posted in the office, a copy of iron ore rate tariff No. 8 showing the rate

upon iron ore from Emerson, Cartersville, and other points to Dayton, a copy of which tariff is filed as Exhibit No. 1 to the deposition of Robert Thompson, which is here shown you?

A. (Examining exhibit referred to.) Yes sir, I had that tariff—I remember having it on file. Yes sir.

14. Where did you keep the tariffs—in what manner were they posted or kept in the office?

A. Prior to our tariff cases—regular tariff cases—I had a tariff case constructed by the railroad carpenter, in which I kept my tariffs prior to this time. I had file, I suppose it consisted of 8 to 10 boxes made in the wall where I kept these tariffs on file.

15. Now, during 1907 and '08 how were they kept, Mr. Gribble?

A. Well, I do not remember just exactly what date our tariff file cases were placed in the office. After they were placed in the office, those tariffs were all placed in the case, you understand that was provided for them.

118 16. Well, before that time, how were they?

A. Before that time, they were in the ca-e on the wall.

17. Well, state whether or not this tariff, this iron ore tariff No. 8 and other tariffs kept by you, were kept subject to the inspection of shippers and the public.

A. It was, yes sir.

18. Do you know who shipped iron ore from Emerson, that was consigned to the Dayton Coal & Iron Co.?

A. I remember one firm that shipped, was the Emerson Mining Co. They shipped some and if I am not mistaken, a Mr. Brooks shipped some. I know he shipped ore, and I think he shipped to the Dayton people, I am most sure he did.

19. Have you any recollection of quoting rates to these parties, and other parties on iron ore to Dayton?

A. I remember when Mr. Satterfield began as Manager for the Emerson Mining Co. of his discussing the rate with me to Dayton, Tennessee.

20. In the conversation did you tell him what the rate was?

A. Yes sir, I remember of getting the tariff and we looked up the rate.

21. State whether or not that was iron ore tariff No. 8 that you quoted?

A. No sir, it was not. It was prior to that time. He was not the Manager of the Mine at this time. It was prior to that, that Mr. Satterfield was Manager.

22. Have you any recollection of the inquiries being made, or of giving any information as to the change in the tariffs or increase in the rate?

A. I do not remember just who were the shippers after that, of the ore. It strikes me Mr. Brooks, was one of the shippers, after this new rate went into effect, and perhaps some ore moved might have some ore moved from the Emerson Mining Co.—I do not remember just exactly—I would not know without going and looking over the record and I do not remember just who were shippers after that

time. It strikes me that Mr. Brooks shipped the majority of
119 it, as best as I remember, I do not remember exactly.

23. Do you remember or not, quoting him the new rate?

A. No sir. I do not remember quoting him the new rate. I do not remember if he called for it. I quoted it to him, I quoted the rate, if he called for it. I do not remember.

24. Now, state whether or not you showed the rate and the freight charges upon the basis of the 70 cent rate upon the Bill of Lading, that was issued and sent along with the car?

A. Well, I do not remember about that.

25. Well, when you billed out iron ore what did you do?

A. Well, for instance, I billed on Chattanooga, I would set down here our proportions over Chattanooga, of 50 cts. per gross tons I would set down and bill Chattanooga at rate of fifty cts. the Co.'s proportion to Chattanooga. Sometimes I would bill it all the way through but as we are always pressed for time, I would usually just bill on and show the rate to Chattanooga.

26. Well, did you, in case of shipments to the Dayton Coal & Iron Co. show the charges coming to the Nashville Road for the haul to Chattanooga?

A. Yes sir, yes sir.

27. And that was 50 cts.?

A. That was 50 cts. part of the time and 40 cts. before the increase.

28. That is after March 1907?

A. Yes sir.

29. Do you know whether there were any shipments from Emerson to other points—to points other than Dayton—named in the iron ore tariff No. 8?

A. Yes sir, there were shipments to other points; there were shipments to Ensley, Alabama, Bessemer, Alabama and if I am not mistaken, I think it will show Rising Sun, Ga. and I do not remember the others, there are a great many rates in there.

30. Those points are on the A. G. S.?

A. Yes sir, and also on the Seaboard—Ensley, I think, is reached by the Seaboard—I do not remember just whether it is or not, but
I know they may be reached by switching charges. I do not
120 remember.

31. Now, state whether or not this iron ore Schedule No. 8 was filed in your office, and used with other tariffs rates, that were kept there for the inspection of the public and accessible to shippers and the public?

A. It was.

Cross-examination.

By Mr. W. B. MILLER, sol'r for the Dayton Coal & Iron Co.:

32. As I understand the rate that you quoted to this Mr. Satterfield to Dayton was a 60 ct. rate?

A. Yes sir, that was quite a while before this—when he was Man-

8
5

ager; I remember we were discussing that. That was while they were opening up for business there. He came in and discussed the rates with me.

33. Now, what was the rate on iron ore at the time this 70 cent rate to Dayton was promulgated in tariff sheet No. 8 if it had just been shipped to Chattanooga and stopped here—say it had been consigned to Chattanooga, it was only 40 cts. a ton, wasn't it?

A. Well, I would have to look at the tariff to see—but it strikes me that the rate was 40 cts. if I am not mistaken. I would have to look at the tariff to see.

34. That is your best recollection, that it was 40 cents?

A. I think it was once a 40 cent rate. I think so if I am not mistaken.

35. Will you examine the tariff and see how that is.

A. I will.

(Examining tariff.) I do not find a rate on there to Chattanooga. Chattanooga I do not think taken much iron from Emerson.

36. Are there any other tariff sheets present, that you can refer to and tell us how that is?

A. None, that I know of.

121 37. Well, it is your best recollection that during the whole of the time when these shipments in controversy were moving to Dayton, that the rate over your line from your station to Chattanooga per ton on this iron ore, if it had stopped at Chattanooga was just 40 cent-?

A. I do not remember about that exactly. It strikes me that I remember of a 40 ct. rate. Now, that is just my memory, I would not be positive about that.

38. And is your memory that—is it your recollection that that 40 cts. rate to Chattanooga was maintained during the whole period, while the 50 cent rate to Dayton was in effect and those shipments were being moved?

A. No sir, I could not state on that, because we did not have very much stuff, if any, that I remember of, that moved to Chattanooga. I did not work that rate.

39. Now, tell me this; have you any recollection that the rate from your station to Chattanooga on iron ore shipment—assuming that the shipment stopped at Chattanooga was ever raised at all from 40 cents?

A. I do not remember about it.

40. If it was raised after April, 1907, do you remember anything about it?

A. No sir, I do not remember it, I did not handle ores that I remember of during that time to Chattanooga, consequently I would not have very much recollection about the rate to Chattanooga.

41. Can you refer to, or procure any tariff sheets that there was ever a raise from that 40 cts. rate on Chattanooga shipments?

A. I do not know that I could.

43. Are you still in the employ of the N. C. & St. L. railway?

A. I am, yes sir.

Mr. BROWN: You can get that from any other man, Mr. Miller.

43. If there was ever any such raise as indicated that is from the 40 cent rate to Chattanooga proper, why the N. C. & St. L. Ry. would have a tariff sheet in its possession so showing, would
122 it not?

A. I think so, yes sir.

Redirect examination.

By Mr. JOE BROWN, sol's for N., C. & St. L. Ry. Company:

$$ State whether or not that during the time these Dayton shipments were moved, you have any recollection of any local shipments of iron ore from Emerson to Chattanooga?

A. That stopped at Chattanooga proper? I do not remember any. I remember when we first began business over there there was a Chattanooga furnace company here and we shipped some ore, and we shipped some ore then. That was on my first work over there and it went into the hands of a Receiver or something, as best I remember, is closed out.

45. That was before March, 1907?

A. Yes sir, a long time before that, about 1904.

Further this deponent saith not.

Signature waived.

I certify that the above witness C. Gribble was duly sworn, by me to this deposition.

CHAS. W. FAIN, *N. P.* [SEAL.]

It is agreed that the N. C. & St. L. Ry. Co. kept a copy of its Iron Ore Tariff Schedule No. 8 and had same on file or posted in its stations at Cartersville, Rogers or other stations in the same manner as it did at Emerson, as testified to in the foregoing deposition.

W. B. MILLER, *Sol'r for Compl't.*
PRITCHARD, ALLISON & LYNCH.

Deposition of H. L. Haynes Filed Feb'y 20, 1913.

The said witness H. L. HAYNES being first duly sworn, was examined and deposed as follows:

123 Direct examination.

By Mr. JOE E. BROWN, sol'r for the N., C. & St. L. Ry. Co.:

1. Please state your residence and age.

A. Nashville, Tennessee, age 38.

2. What position if any do you hold with the def't Nashville, Chattanooga & St. Louis Ry. Co.?

A. I am Chief Clerk to the General Freight Agent.

3. Where is the office to the General Freight Agent?

A. At Nashville.

4. Is your office at Nashville?

A. Yes sir.

5. Well what was your position with the Co. during Feb'y and March, 1907?

A. In Feb'y and March, 1907, I was General Rate Clerk.

6. Is that the same position as you hold now?

A. No.

7. I did not understand that you were General Clerk, that is——

A. (Interrupting.) I was General Rate Clerk.

8. During Feb'y and March, 1907, you were the——

A. General Rate Clerk

9. General Rate Clerk. What duties do you perform as General Rate Clerk for the N. C. & St. L. Ry. Mr. Haynes?

A. Well, I was next in authority to the Chief Clerk, and was in charge of the office in his absence and had general jurisdiction over all of the issuance of tariffs and correspondence pertaining to it.

10. Did you have anything to do with making and publishing the freight tariff schedule of rate?

A. Yes sir.

11. Are you now and were you then, familiar with the freight rates upon Iron ore from Cartersville, Ga., Emerson, Ga., and other points on the W. & A. to Dayton, Tenn.?

A. Yes sir.

12. State what the tariff rate was from these points on the
124 W. & A. to Dayton, and other points prior to March, 1907?

A. Prior to March, 1907, the rate was 60 cents per gross ton as shown in Iron Ore Tariff No. 7.

13. Now, that is what is called a joint tariff rate?

A. A joint tariff rate, yes sir.

14. State whether or not the C. N. O. & T. P. was shown as a participanting carrier in that rate?

A. It was.

15. If that joint rate was changed on increased at any time state why it was changed and in what respect it was increased and when?

A. The rate from Dayton increased from 60 to 70 cts. effective March 7, 1907, iron ore tariff No. 8 I. C. C. 1351-A.

16. Did that iron ore tariff No. 8 supercede or cancel prior tariffs or not?

A. It superceded specifically iron ore tariff No. 7 I. C. C. 1314-A.

17. Iron Ore tariff No. 7 named a rate of 50 cents?

A. Yes sir.

18. State whether or not Iron Ore Tariff No. 8 showing the rate from these points on the W. & A. to Dayton, was published and filed with the Interstate Commerce Commission?

A. Yes sir, it was—all the tariffs were.

19. What connection, if any, did you have with the making and publication and filing of that tariff?

A. Well, I do not know that I had any direct connection with the

publication and filing of those two tariffs. It was—the matter was handled by other people in the office, but under our rules, all of the Interstate Tariffs are filed on the day they are shown on the face of the tariff as being issued and iron ore tariff No. 8 was in accordance with the regular run of business mailed to the Interstate Commerce Commission, on Feb'y 2, 1907.

20. State whether or not a copy of that tariff was sent to other places, and if so, to whom it was sent in the regular course of businest?

A. Copies were furnished all the agents from which the
125 tariffs applied on our line; and also the general freight offices of the participating carriers.

21. Do you know, Mr. Haynes, why the Nashville road increased the joint tariff on iron ore from Emerson, Cartersville and other points to Dayton, from 60 to 70 cents?

A. The increase of ten cents was merely a part of a general revision of our ore rates to 11 points—to all furnace points not located on our rail. We conclude- to require a minimum of 50 cents a ton for our services. And as Dayton is not on our rail, that came under the general revision. Iron ore tariff No. 8 represents in advance of practically ten cents a ton on all points situated as is Dayton, with respect to our company.

22. Now what was the local rate at that time, and what has it been since, from Emerson and Cartersville to Chattanooga?

A. 40 cents.

23. What is the reason for charging 50 cents upon a haul to Dayton, whereas, you only charge 40 cents for a haul to Chattanooga proper of this commodity?

A. The iron ore brought into Chattanooga—we have a very good opportunity to get some of outbound movements—outbound products. And the inbound rate on ore represents a rate on raw material as most of the carriers have an understanding with the iron furnaces that their outbound products will be distributed in propertion to the amount of the raw materail inbound, therefore the 40 cent rate into Chattanooga locally, represents a part of our earnings only, and whereas, the 50 cent on business going to Dayton represents all that we would eanr out of -he ore.

24. Now, when this rate on Iron Ore from Emerson and Cartersville was raised to 70 cents for the N. C. & St. L. by the initial line, state whether or not you notified the C. N. O. & T. P. that the Nashville Road was going to raise the rate—do you know how that was?

A. We do not notify them directly about the rate—we merely send them a copy of the tariffs, the same as we do to all of
126 our connections that were effected by the change—by A. G. S. the L. & N. the Seaboard and the Southern.

25. Then, as I understand there was no correspondence with the C. N. O. & T. P.?

A. No correspondence with any of our connections.

26. Can you give any reason why the C. N. O. & T. P. Railway was not given specific information by correspondecne that the Nashville road was going to publish that rate?

A. Well, it is not usual for the initial lines to notify their connections of their intention to publish new rates where the earnings of the connecting line is not effected.

27. State whether or not in this instance the proportion of the earnings which would go to the C. N. O. & T. P. were effected or changed by the increase in the tariff?

A. No sir, they were not.

28. What was the earning that would accrue to the C. N. O. & T. P. under iron ore tariff No. 7?

A. 20 cents.

29. And under this tariff No. 8 it remained the same thing?

A. The same thing.

30. In this tariff No. 8——

A. (Interrupting.) It remained the same.

31. Are you familiar with the rules adopted by the Interstate Commerce Commission with respect to filong the concurrencies of connecting carriers in rates published by initial carriers?

A. Fairly so; yes, sir.

32. Do you know when, or about when, these rules were adopted applying to the filing of concurrencies by the connecting carriers?

A. Well, the re-organized Interstate Commerce Commission issued a set of rules bearing on this subject in May, 1907. They were the first rules that were laid down in pamphlet form.

33. Now, before May, 1907, what was the practice or custom followed by railroad companies generally, with respect to concurring in rates published and filed with the commission by the originating carriers?

127 A. Well, most of the lines filed with the Interstate Commerce Commission, what was known as a blanket concurrence, indicating that they concurred in any tariff filed by any other common carrier in the United States, unless specific exception was taken to that tariff. Some of the lines, however, did not file that general concurrence as is stated by the Interstate Commerce Commission, in their present rules. But the Commission, however, ruled that where the carrier did not file such blanket concurrence but did accept traffic under tariffs, purporting to be filed under such concurrencies, that they would not declare such tariffs illegal. Now, that rule will be found in the Commission tariff circular 12, A rule 68.

34. State whether or not it was the practice and the custom among the railroads when those general concurrencies had been filed, to treat as effective any valid rate, when schedules were raised, and no objection made to the rate named in the schedules, prior to May 1907?

A. It was.

35. State whether or not the C. N. O. & T. P. R'y or any other carriers named in this rate, accepted the traffic from the Nashville road upon the basis of that rate?

A. Yes sir, they did.

36. Have you any record of the C. N. O. & T .P. Ry. or any other participating carrier named in this rate, having made objection to

the rate; or having notified the Nashville road that tyey did not concur in the rate?

A. No sir, they never did notify us that theu did not concur in it.

37. Now, at the time this iron ore rate from Emerson and Cartersville was increased in March 1907; state whether ir not the Nashville road, or the general freight offices of the Nashville road had any knowledge of the fact that the Dayton Coal & Iron Co. had made a contract for the delivery of iron ore to it from Emerson and Cartersville and other points on it in Georgia?

A. No sir, they did not have any knowledge of such a contract.

128 Cross-examination.

By Mr. ROBERT PRITCHARD, Sol'r for the C. N. O. & T. P. Ry. Company:

38. I notice that on the joint tariff No. 8 that it is published and entitled "the joint freight tariff on the Nashville Chattanooga & St. Louis Railway, in connection with the Alabama Great Southern Railroad, Cincinnati, New Orleans & Texas Pacifici Ry., Louisville & Nashville Railroad, Seaboard Air Line and Southern Railway". St that time was it the practice or custom to otherwise indicate the concurrence of the connecting lines, or was the naming of the connecting line upon the tariff treated as noticd of their concurrence?

A. The naming of the lines were treated as notice of their concurrence, and with this additional note shown on the face "Traffif officials of lines made parties hereto will certify to the Interstate Commerce Commission, their concurrence in rate published herein.

39. Buy yet I understand you as a matter of fact, it was not then the custom even to certify—it was not then the common custom to certify to the Interstate Commerce Commission that the connecting carriers had concurred?

A. That is right.

40. And many of the rates—some of the roads had on file a sort of general blanket concurrence, but whether they had filed the blanket concurrence or not, unless they objected to the rates they were treated as concurrence in the rate?

A. Yes sir.

41. And that was the custom generally prevailing?

A. Yes sir, that is true.

Redirect examination.

By Mr. JOE E. BROWN:

42. What is the custom if you knoe, eith the roads with respect to filing schedules or tariffs received from other railroads? How are they kept, if you know?

129 Aa. You mean in the general offices of the lines receiving them?

A. Yes.

A. Well, in our office, and I presume there is the same custom

throughout the entire territory we stamp these tariffs the date they came, showing on the face of the tariff when it is received. That tariff—the traffic are then distributed, to the different rate desks in our office, handling them. They proceed to take th-m up and determine what changes have been made, from the tariff in effect prior to that, and if our agents and auditors are interested we either secure a sufficient number of these foreign line tariffs to furnish our interested people or issue a mimeograph or som- other kind of a tariff giving this information to our people—not being filed. However with the Interstate Commerce commission.

44. That, as I understand, is the practice where you receive tariffs in which you are named as a participating carrier?

A. That is right.

45. State whether or not you are then prepared to furnish upon inquiry the tariff from the points—the rates from the points named in those tariffs?

A. Yes sir.

Cross-examination.

By Mr. W. B. MILLER, Sol'r for the Dayton Coal & Iron Co.:

46. What were your duties in detail at the time these iron ore shipments in controversey moved, and for some months immediately prior to that time?

A. Well, Mr. Miller, I was in direct charge of what we call our Southeaster desk in our office. Direct charge of changes of published rates to the Southeast from the West and numerous other matters which were turned over to me by the General Freight Agentm or Chief Clerk.

47. What did you have to do with fixing the rates yourself; that is with deciding on what the rates should be, or whether they should be an increase or decrease if there was ever a decrease—I
130 have never found one as yet, when that come up did you decide that in the first instance?

A. No sir, I did not.

48. Who determoied as to whether or not the rate should be advanced and to what extent it should be advanced?

A. Well, it depended entirely upon what that rate was?

49. Well, take this rate in controversey—which is in controversey—who is responsible for raising this from 60 to 70 cts.?

A. Well, our instructions came fro- the General Freight Agent.

50. Who is that?

A. Well, Mr. Charles Varkham.

51. And where was his office?

A. Nashville.

52. Did you talk with him on the subject?

A. No sir, I did not.

53. How did you get your instructions from him—and how were they transmitted?

A. By memorandum—written memorandum. Written instructions.

54. And was that passed directly to you, or who would receive the- first?

A. I do not know whether this came direct to the Chief Clerk or th the ass't general freight agent. Ordinarily, however, he would direct his memorandum to the assistant ageneral freight agent, in charge of rate adjustment. He would then endorse it to his Chief Clerk and the Chief Clerk would turn it over to the man who actually issued the tariffs.

55. And was that may who actually issued it at that time yourself?

A. No sir.

56. Who actually issued it, or caused it to be issued directly?

A. The man in charge of iron ore tariffs who was named Kirk, I believe.

57. Then what, if anything, did you have to do with either the fixing of this tariff or the publishing of it—I mean this tariff?

A. Personally, I had nothing to do with it. He would
131 have it issued without my being in the office at all.

58. Then when you say that the Nashville, Chattanooga & St. Louis Railway Co. did not know about any contract being made, between the Dayton Coal & Iron Co. and the owners of this iron ore for a long time contract, or a long time delivery of this ore, you simply mean that so far as you know, your company did not know anything about that contract?

A. I mean that so far as the information came to the rating depar-ment,—contracts with anybody *with anybody* were not taken into consideration at all, and that accor*idngly* to all the papers that I saw on the subject, the fact is, we know nothing about the contrace at all.

59. Do you know how it happened that this rate was raised to 70 cents after a long time contract of the Dayton Coal & Iron Co. for this ore went into effect?

A. No sir, I do not.

60. The rate to Chattanooga, Tennessee, from Emerson and Rogers Ga. remained at 40 cents during this entire period in controversy?

A. Yes sir.

61. Also from Cartersville?

A. Yes sir.

62. Then, as I understand, the shipper could cause his iron ore to be consigned to Chattanooga and have had the 40 cent rate during the entire period.

A. Yes sir, Chattanooga proper.

63. And if he in turn wanted to ship the ore on to Dayton, he would have gotten a 20 cent rate from Chattanooga on up to Dayton?

A. I do not know how the C. N. O. & T. P. issued their rates from Chattanooga. I do not—I have not seen a tariff carrying a 20 cent rate. I do not know whether it was issued in tariff form the arbitrary proposition they named their connection to carry on the business.

64. Examine Ex. No. 3 to the deposition of Robert Thompson, in this cause and tell us what it is, from your experience as a
132 railroad man, please.

A. That looks like a rate sheet.

65. And how would you designate that, if you were going to refer to it—what number would you give it—so it could be identified in shipping and railroad circles?

A. I would say C. N. O. & T. P. Railroad No. R-196, coal rate, 3242. I. C. C. No. 3269.

66. For short it might be designated among the agents of the C. N. O. & T. P. as R 196 might it not?

A. Yes sir.

67. Now, what do you understand to be the charge on this ore in controversy as fixed by that Exhibit No. 3?

A. Ore from Chattanooga, Tennessee, C. N. O. & T. P. track to Dayton, 20 cents per ton, 2240 pounds.

68. And what is the rate, accordingly to that, from Chattanooga to Cartersville, and Rogers and Emerson?

A. I do not see anything like that here, Mr. Miller. Did you say Chattanooga to Cartersville and Emerson?

69. Yes, you do not find anything like that?

A. No sir.

70. Do you understand that there is a through rate named on that subject on ore from points on your road, namely; Cartersville, Rogers and Emerson to Dayton and if so what do you understand that to be?

A. Why, I see a rate here from Cartersville of 60 cents. I do not know what page number it is on though.

The pages are not numbered, Mr. Miller.

71. Now, which company had authority to bind the other one, as you understand, the C. N. O. & T. P. to bind your company, by issuing a 60 cent rate, or your Co. to bind the C. N. O. & T. P. by issuing the 70 cent rate on iron ore?

A. Well, the C. N. O. & T. P. had no authority to name any rate for us.

72. You did not file a blanket concurrence?

A. No, the blanket concurrency we have been speaking about here only covers participating carriers; and did not give anybody power of attorney or authority to issue rates from some other
133 line.

73. These rules and rulings of the Commerce Commission which you have referred to, are of course all in writing?

A. Yes sir, they are all in printed form.

74. Who had charge of the distribution of your tariff sheets as they were changed from time to time in the year 1907 among the companies known as participating carriers?

A. You mean as far as our office is concerned?

75. Yes sir.

A. Well we have a regular department that is in charge of the mailing, and all tariffs were turned over to that department to be mailed.

76. Then of course you did not have any personal recollection or knowledge as to what — denominate- as iron ore sheet No. 8 was actually mailed to the C. N. O. & T. P. or not, have you?

A. No sir.

77. And, do I understand from your examination in chief that the C. N. O. & T. P. Railroad company, in no wise concurred in that tariff No. 8; that is, it signifies its concurrence in no way direct, with your company; have you any evidence of such concurrence.

A. No, we have not any specific concurrence from them on that tariff, nor have we notice of non-concurrence.

78. Now have you examined your files to see if you have a notice of non-concurrence.

A. Yes sir.

79. Did not you find there a letter from the C. N. O. & T. P. quite a while after May 1907, demanding to know on what authority this 70 cent rate had been put into effect?

A. Yes sir.

80. Will you please produce that letter, and file it as Exhibit "A" to your testimony, or copy of it?

A. I would not like to file the letter.

81. Then file a copy of it as exhibit "A".

A. Yes sir.

82. Is that a letter of July 27, 1908?

A. Yes sir.

83. You might, if this is a copy, I do not know whether
134 it is or not an exact copy.

A. A copy of this letter has already been filed as Exhibit "B" to the deposition of Mr. F. B. Claggett except that the date, February 23, 1905 in the fourth line should be February 23, 1906. I have the original and in as much as the copy is filed, I do not wish to file the original.

Mr. BROWN: Now say, for the N. C. & St. L. Railway agrees that the copy already exhibited be treated as of the same force and effect as the original; reserving exceptions for competency and relevency.

Mr. BROWN: I am going to ask him to file the answers and Let him make copies of them and file them.

Mr. MILLER: Well, I want to see them, of course.

Mr. BROWN: Well, I am agreeing that you should file copies.

Mr. MILLER: Well, I mean that I want to see the originals of the papers that you propose to file copies of. I have not seen them and I want to see what you propsoe to file.

Mr. BROWN: Well, you will object to it?

Mr. MILLER: I do not know whet-er I will object to it or not.

Mr. BROWN: It is all of equal competency.

Mr. MILLER: You appear to misunderstand me—you say you are going to ask him to file copies of the papers. I want to see the papers you are going to file. I might want to ask something about them myself. I have not seen the reply. It has not been exhibited, so far as I know. There might be something in it I want to ask him to explain, *which* he is on the stand. Well what have you

decided about that letter, Mr. Pritchard,—do you want the original or not?

Mr. PRITCHARD: I do not want the original letters.

Q. 84. Did uou know a Mr. S. D. Cowdan in March, 1908?

A. Yes. sir,

Q. 85. What position did he hold with your company?

A. He was claim agent.

Q. 86. Who conducted the correspondence between your company and the C. N. O. & T. P. about this controversy?

A. Well, the letter that I have just referred to there was handled by our general freight agent, if that is the correspond-

135 dence.

Q. 87. Who conducted the remainded of the correspondence between your company and the C. N. O. & T. P. Railway?

A. I do not know, you may be referring to the collection of the money, and if that is the fact, I do not know anything about that.

Q. 88. Well, you have a file of correspondence here with you to-day, have you not?

A. Yes, sir.

Q. 89. That is the correspondence passing in part between your line and the C. N. O. & T. O. Railway about this very controversy?

A. Yes. The reason I said that, was you inquired about the claim agent, and, of course the claim agent has nothing to do with the adjusting of rates, you understand.

Q. 90. How manu furnaces were there along the C. N. O. & T. P. railway lines at the time of this controversy—and besides the ones at Dayton and Rockwood, so far as you know?

A. I do not know, Mr. Miller.

Q. 91. Then, you do not know that the rates to all points where furnaces were located, were raised, do you?

A. I do know that they were raised where we had through rates.

Q. 92. Where you had which?

A. Through rates.

Q. 93. Well, did you have through rates to other points as well as Dayton, on the C. N. O. & T. P. Railway?

A. They are all covered by the tariff, which is already on file.

Q. 94. How d- you know that furnaces were only at those places where you had through rates?

A. Well, I do not know that. I said the tariff contains all of the through rates we had.

Q. 95. You do not know whether those towns were all furnace towns or how that was?

A. No sir.

Q. 96. You do not mean that a general raise by your line

136 as to all points situated off your line, where your line was named as the initial carrier, was made at that time?

A. Wherever we had through rates in effect the-e was an advance.

Q. 97. Did you have through rates in effect only to points shown on y-ur tariff No. —?

A. Yes, sir.

Q. 98. With all the connecting lines of your road, are these the only through rates you h-d?

A. Yes, sir. These are the only through rates we had in.

Q. 99. Then, you raised all you- through rates at that time, is that right?

A. Yes, sir.

Q. 100. And they were without regard to whether they were furnace towns, or what the commodity was that was being shipped?

A. Oh no, no. You misunderstand me, sir. I have reference to only one rate.

Q. 101. You do not mean there was a general raise in all rates at that time?

A. General raise in iron ore only.

Q. 102. Do you or not know that there is a furnace located at Harriman, Tennessee?

A. Personally, I do not, sir. We have rates on iron ore from Harriman though, and I supposed there must be a furnace there.

Q. 103. What is meant by the division sheet referred to in this letter from Mr. Proveleite, the general freight agent, of July 27 1908?

A. What is the number he refers to, Mr. Miller?

Q. 104. The letter is July 27, 1908, and as I understand it, you refer t-ere to a division sheet near the close of the letter.

A. Well let's see the letter there somewhere. (Referring to letter.) Well, Mr. Provlotite referred to division basis No. 3025 corrected which was August 24th. There was a revision of the sixty cent rate in effect prior to iron ore tariff No. 8. That division sheet was superseded by division basis No. 3321 issued February 8, 1907.

137 And accordingly to Mr. Provolite's letter, he did have division basis No. 3321 in front of him. The 3221 shows divisions to Chattanooga, fifty cents.

Q. 105. Well, then, what he is referring to is a sheet of writing of some kind which shows the divisions between the two roads?

A. Yes, sir.

Q. 106. Now, as I understand, there was no adjustment of that difference of ten cents per ton between those two lines for quite a while after these shipments were delivered?

A. I do noy know about that. The building is on a basis of fifty cents to Chattanooga.

Q. 107. Yes, but the payment was not on that basis.

A. Well, I cannot say as to how the settlement was made between our auditing department, but I should assume it was on a basis of fifty cents to Chattanooga.

Q. 108. Now, hav-n't you any method of ascertaining how, or when that settlement was made?

A. Oh, yes; we could find out from our auditing people.

Q. 109. You have not anything before you to show how that was?

A. No sir.

Q. 110. Evidently it had not been made at the time this letter was written in 1910?

A. Well, he would be in the same position we are in. He would

not know anything about the settlement between the two companies. That is handled in another department entirely.

Q. 111. But Mr. Provolite, who is general freight agent of the C. N. O. & T. P., says that he understands that your line is still accepting forty cents per ton to Chattanooga.

A. Well, his understanding is wrong.

Q. 112. Well, as I understand you, you do not know how that was? You have no positive knowledge as to how that was?

A. Yes, here is our division sheet, issued February 8, 1907, instructing our agent to bill out at seventy cents.

Q. 113. But you do not — what your Comptroller did?

A. No, I cannot know. I cannot say what he did, but he is governed by instructions received from us.

138 Q. 114. He was governed by instructions received from the general freight agent?

A. Exactly.

Q. 115. You do not know what instructions the general freight agent gave him on that subject, do you?

A. Here is a copy of it, right here.

Q. 116. What you have is reported copy of the division sheet, isn't it?

A. Yes, sir.

Q. 117. How do you know then, Mr. Haynes, that your general freight agent did not issue a special instruction?

A. It would be in a division sheet that way.

Q. 118. Do you mean to say that your general freight agent does not in cases of controverted claims, ever make any special rating at all?

A. In some cases he does.

Q. 119. How are you prepared to say that it was not done in this case?

A. Of course I cannot say, of my own knowledge, Mr. Miller, that the basis of fifty cents to Chattanooga was observed or not observed. But accordingly to all of our instructions to the the auditing department and to the billing agent it should have been on a basis of fifty cents.

Q. 120. That is your conclusion, as a lawyer, but you do not know what your superiors did?

A. Well, as I just said, that question was determined by referring to the auditing department bills. You can find out how they settled that with the C. N. O. & T. P. Road for these ore shipments.

Q. 121. Does your file contain any correspondence between Mr. Malloy, at Cincinnati, and Mr. Cowden, your claim agent?

A. No, sir; I have not seen anything of that kind.

Q. 122. Well, I will ask you to examine Exhibit No. 13, to the deposition of Mr. Thompson, and assuming that that is a correct copy of Mr. Cowden's letter, *what* would you say that this matter of controversy of ten cents per ton had been adjusted between the two roads at that time?

139 A. I cannot say, Mr. Miller, what brings this thing up. You understand the claim department and the auditing de-

partment are entirely separate. Now, the auditor may make a settlement, and it may not be satisfactory to the C. N. O. & T. P., or the N. C. & St. L. as the case may be, and then they undertake to starighten it out through the claim department.

Q. 123. Well, as I understand this controversy, either the C. N. O. & T. P. did collect for your road fifty cents per ton on this ore; or else it did not, one of the two; and what I want to find out is, which is correct; did it pay on the fifty cent or on the forty cent rate?

A. I cannot find out for you.

Q. 124. You do not know how that is; you have no information on the subject?

A. No sir.

Q. 125. You came here from the Nashville office to give this deposition without this information?

A. Yes, sir.

Recross-examination.

By Mr. PRITCHARD, solicitor for the C., N. O. & T. P. Railway Co.:

Q. 126. After the iron ore tariff No. 8 had been issued on February 2, 1907, did the N. C. & St. L. Railway issue any bulletin showing what the division basis under that tariff sheet was, and if so, what did it show the division basis to be?

A. Yes, sir, we issued the specific division on the rate on iron ore to Dayton, Tennessee, from Barton, Cartersville, Emerson and Rogers, Georgia, showing the proportion to Chattanooga fifty cents, beyond twenty cents, total seventy cents per ton, twenty-two hundred forty pounds.

Q. 127. Now, when was that issue?

A. That was issued February 8, 1907.

Q. 128. When did it become effective?

A. March 5, 1907.

Q. 129. Was that division basis under iron ore tariff No. 8?

A. Yes, sir.

Q. 130. And is that the rate that has been collected and that the division which has been maintained from March 1907, to the
140 present time?

A. So far as I know, it is sir.

Q. 131. Now, I will ask you to state whether or not that same division basis sheet showing the division basis from Barton, Cartersville, Emerson and Rodgers to Harriman, Tennessee?

A. It does sir.

Q. 132. How much is the rate to Chattanooga, and how much beyond Chattanooga, to Harriman?

A. The proportion to Harriman are shown; to Chattanooga fifty cents, beyond forty.

Q. 133. The total through rate to Harriman was therefore ninety cents?

A. Yes, sir.

Q. 134. Your road got fifty and the C. N. O. & T. P. got forty?

A. Yes, sir.

Q. 135. Do you know how far Harriman is from Dayton?
A. No, sir, I do not.
Q. 136. Well, is iy probably less than fifty miles?
A. Yes, sir.
Q. 127. Please file as Exhibit "A" a copy of the division basis No. 3321 issued February 8, 1907, effective March 5, 1907 to your deposition.
A. I do so.

Exhibit "A".

Redirect examination.

By Mr. BROWN, Solicitor for the N. C. & St. L. Railway:

Q. 138. Mr. Haynes, please state whether or not the present rate on i-on ore from Emerson and Cartersville, Georgia, to Dayton is seventy cents?
A. Yes, sir.
Q. 139. Has that rate ever been changed or lowered since it was promulgated March, 1907?
A. No, sir.
Q. 140. Do you know whether or not the Dayton Coal & Iron Company or anybody else, has ever made an complaint to the Interstate commerce Commission and asked that the raye be lowered bwtween these two points.
141 A. We have never heard of any complaint, sir.
Q. 141. If you have any letters from Mr. Barham, the general freight agent, to Mr. Provolite, answering the inquirt contained in his letter to which you have referred in your cross-examination, and which is made Exhibit to the deposition of Mr. Cleggett, will you have *no* objection to filing the original letter, will you please make copies of those letters and file them as Exhibt- 2 and 3 to your deposition?

Mr. MILLER: I am entirely willing that these copies be filed and have the same force and effect as the original. I do not agree that either of them are competent, and reserve exceptions on that behalf.

Recross-examination.

By Mr. W. B. MILLER, Solicitor for the Dayton Coal & Iron Co.:

A. 142. I notice in the copy of letter of your general freight agent, addressed to Mr. Provolote, October 16, 1908, you refer to the matter going before the Interstate Commerce Commission, or rather your general freight agent does. I will ask you to please produce and file the letter, or copy of letter from Mr. Provolite, which deals with that question, and to which your general freight agent's letter of October 16th, was evidently written by way of reply.
A. I will do so, sir, as Exhibit No. 4.
Q. 143. I will ask ycu to file the original, unless adverse counsel will agree to the use of this property.

Mr. BROWN: For the N. C. & St. L., I agree that the copy of letter may be filed and treated with the same force and effect as the original, reserving exceptions for competency and relevancy.

Mr. PRITCHARD: For the C. N. O. & T. P. Railway Company, I agree to the same.

Mr. MILLER: I will excuse him from filing the original and ask him to make a copy and file that.

Q. 144. Are you prepared to say whether Exhibit No. 3 to Mr. Thompson's deposition was written—was ever filed in the office of your company at Nashville?

A. No, sir, I am not.

142 Q. 145. According to the usual course of business, it would have been, would it not?

A. In the ordinary course of business, it would have been. But, according to the exchange list shown on the face of this tariff, it does not appear to have gone to us. You see that exchange list, I. C. C. Auditor 5, Stevens 3, Dayton 3, agents named 3, Harriman agent 3, C. M. S. 3, G. M. H. 3——

Q. 146. (Interrupting.) Those are all the employe-s or officials of the C. N. O. & T. P. Railroad?

A. Apparently, yes, sir.

Q. 147. You are not prepared to say whether the connecting carriers shown at the time of the issuance of that sheet were furnished with copies, or not?

A. No, sir.

Further this deponent sayeth not.

Sworn to before me September 9th, 1912.

[SEAL.] CHAS. M. FAIN,
Notary Public.

142*a* Division Basis No. 3321
Supersedes D/B No. 3025 (Cor.)

Division Basis
of the
Nashville, Chattanooga & St. Louis Ry.

Freight Traffic Department.

Basis for Dividing
Rates of Freight
on
Iron Ore? CL.
Minimum weight as per tariff.

Iron Ore Division Basis No. 5.

From
Local points
Dayton to —, Tenn.

To.	From.	Per ton 2240 pounds.
Dayton ... Tenn.	Bartow ..... Ga. Cartersville ..... " Emerson ..... " Rogers ..... "	To Chattanooga ..50 Beyond .....20 — Total .....70 cts.
Harriman, Tenn.	Bartow ..... Ga. Cartersville ..... " Emerson ..... " Rogers ..... "	To Chattanooga ..50 B-yond .....40 — Total .....90 cents

Issued Feb. 8, 1907. Eeefective March 5, 1907.

File 975-M. CB.
Pro 39786-A.

143 EXHIBIT "A" to Deposition of H. L. Haynes.

143*a* NASHVILLE, TENN., Oct 1, 1908.
2739-B.

Mr. H. A. Povelette, G. F. A., Cincinnati, O.

DEAR SIR: Your personal 30th ult. files sol 55-C Rate 244-C.

The delay in answering your previous letters was brought about by our desire to reach a final decision with respect to the future, assuming, of course, this was the feature in which you had chief concern, inasmuch as whatever ore may have moved must of necessity be charged for on basis of the tariffs than legally in effect.

We have not so far fully determined just what we will hereafter do, but on this point I hope to be in position to write you before very long.

As to the change it self, this revision which resulted in an advance of 10 cents to Dayton from W. & A. ore beds was a part of a general revision, but applied at that point equally with other furnace stations other than the W. & A.

Yours truly,
(Signed) C. BARHAM,
General Freight Agent.

An Exact Copy.

144 EXHIBIT No. 2 to Deposition of H. L. Haynes.

144*a* Cincinnati, New Orleans & Texas Pacific Railway Co.

Freight Department.

CINCINNATI, OHIO, October 3, 1908.

Refer to File Sol. 555-C.
Iron Ore from Cartersville and Emerson, Ga., to Dayton, Tenn.

Personal.

Mr. Chas. Barham, G. F. A., Nashville, Chattanooga & St. Louis R*t*., Nashville, Tenn.

DEAR SIR: Your 2739-B-October 1st.

Your letter fails to answer the partocular point we raise; namely increase in the rates in face of contract based on your tariff rate and without notification to the parties concerned or to this office of tour intention to revise the rates; neither do you answer specifically the point in regard to the divisions of the new rate, which, according to our records, would still show the N. C. St. L.'s proportion as 40 cents per ton. This matter will undoubtedly be taken before the Interstate Commerce Commission and if our records are brought into evidence they will show clearly that the N. C. St. L.'s provisions provide for no increase in the proportion of your earnings, although as a matter of fact I understand you have erroneously been allowed 50¢ per ton out of the 70 cent rate.

As a matter of equity, it certainly does not seem right that just as the time the contract was being made an advance of 10 cents per ton should have been put into effect without any notice to the people most vitally concerned in the rate, and as a matter of justice to ourselves we certainly should have had some premonition of it in order that our records might have been properly revised.

The manner of handling this question has put us in an extremely embarrassing position and I hoped to have definite advice from you with respect to the points raised before this.

Yours truly,
(Signed) H. A. POVELEITE, *G. F. A.*

Dict. 5.
An Exact Copy.

145 EXHIBIT No. 3 to Deposition of H. L. Haynes.

145a NASHVILLE, TENN., October 16, 1908.

2739-B.

Mr. H. A. Povelette, G. F. A., Cincinnati, Ohio.

DEAR SIR: Please see your letter 3rd. file Sol. 555-C.

The point you raise is as I understand it, that a contract existed between the furnace operators and these shippers of ore from points on the W. & A. and that in the face of this contract an advance should not have been made without notification to the parties concerned and to your office.

In the first place, we had no knowledge of this contract. In the second, notice was given your office both in the form of a tariff itself and in the form of divisions to that tariff. Our records show both to have been promptly mailed and you have, I believe acknowledged their receipt. I doubt if any of us will want to admit the principle that individual notice to a given shipper or consignee is a prerequsite to the changing of a rate.

If you have been ambarrassed we naturally regret it, but the revision was made after mature deliberation, was a part of a general adjustment, all the legal formalities were duly regarded and I am totally unable to see how less than this legal rate may be collected or less retained.

If, as you say, the matter goes before the I. C. Commission, we must prepare ourselves to defend the rate as best we can; nor am I particularly apprehensive on the score of inability; at least, we have sufficient experience.

145b Yours truly,

(Signed) C. BARHAM,

General Freight Agent.

An Exact Copy.

146 EXHIBIT No. 4 to Deposition of H. L. Haynes.

146a October 19, 1908.

2739-B.

Mr. H. A. Poveleite, G. F. A., Cincinnati, O.

DEAR SIR: Permit me to enclose herewith a corrected copy of my letter of October 16th, one or two typographical errors having appeared in the first paragraph.

Yours truly,

(Signed) C. BARHAM,

General Freight Agen-.

An Exact Copy.

147 EXHIBIT No. 5 to Deposition of H. L. Haynes.

148 *Order Enrolled 25th Day of February*, 1913.

No. 12597.

DAYTON COAL & IRON COMPANY, LIMITED,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY et al.

This day this cause came on to be heard on the motion of the Cincinnati, New Orleans and Texas Pacific Railway Company for leave to file a cross-bill in this cause against Dayton Coal & Iron Company, Limited, and the Nashville, Chattanooga & St. Louis Railway: which cross-bill was presented to the court.

After argument, the court is pleased to grant the motion and permit the filing of the cross-bill.

The attorneys for the Nashville, Chattanooga & St. Louis Railway and the Dayton Coal & Iron Company, Limited, in open court waived the issuance and service of process.

The court granted to each of said defendants to the cross-bill fifteen days in which to answer so as not to delay the h-aring of the cause at the April term of this court.

By agreement, the Nashville, Chattanooga & St. Louis Railway was permitted, if it desired, to treat its answer to the original bill as an answer to the cross-bill; and the Dayton Coal & Iron Company, Limited, was permitted, if it desired, to treat the allegations of its original bill as an answer to the cross-bill.

Cross-bill of C., N. O. & T. P. Railway Company. Filed February 24th, 1913, *in the Chancery Court at Chattanooga, Tennessee.*

To the Hon. T. M. McConnell, Chancellor, etc., holding the Chancery Court at Chattanooga, Tennessee:

Cross-bill of Complaint of the Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation chartered under the laws of the State of Ohio, doing business in the States of Ohio, Kentucky, and Tennessee, complainant, against Dayton Coal & Iron Company, Limited, a foreign corporation, doing business in the State of Tennessee, with an office and place of business in
149 Rhea County, Tennessee; Nashville, Chattanooga & St. Louis Railway, a corporation organized under the laws of the State of Tennessee, defendants.

Cross-complainant would respectfully show the Court that on May 10, 1911, the Dayton Coal & Iron Company, Limited, filed its original bill in this cause, No. 12597, making as defendants to said original bill your cross-complainant, also the Nashville, Chattanooga

& St. Louis Railway and the Western & Atlanta Railroad Company. Said bill alleges that cross-complainant Cincinnati, New Orleans & Texas Pacific Railway Company was a common carrier of freight and passengers, operating a line of railway for that purpose running from Cincinnati, in the State of Ohio, to Chattanooga, in the State of Tennessee; and that the Nashville, Chattanooga & St. Louis Railway was a common carrier of freight and passengers, operating a line of railway in the States of Tennessee and Georgia, and that the Western & Atlanta Railroad Company owned a line of railroad extending from Cartersville, Georgia, to Chattanooga, Tennessee, but that said road had been leased to the Nashville, Chattanooga & St. Louis Railway and had been operated by said Dayton Coal company since 1900. The bill alleged that the said Dayton Coal & Iron Company, Limited, was a corporation engaged in the manufacture of pig iron at Dayton, Tennessee, a place on the line of cross-complainant's road some thirty-eight miles North of Chattanooga. All these allegations were and are true.

Complainant alleged that prior to 1907 it had been shipping iron ore from Cartersville, Georgia, and points nearby to its works at Dayton, Tennessee, at a through freight rate of sixty cents per ton over the lines of the defendant N. C. & St. L. Railway to Chattanooga and from thence to Dayton, over the line of the cross-complainant; that in the early part of the year 1907 said Dayton Coal & Iron Company, Limited, called on the agent of the cross-complainant at Dayton for the through freight rate from Cartersville, Georgia, to Dayton, Tennessee, and was quoted a rate of sixty cents per ton over the lines referred to; that in the spring of 1907 the said Dayton Coal & Iron Company began shipping ore from Cartersville to Dayton over the lines referred to, and that bills were ren-
150 dered to the complainant by the cross-complainant's agent *by the cross-complainant's agent* claiming seventy cents per ton instead of sixty cents; that said complainant Coal Company declined to pay additional ten cents per ton demanded and that the cross-complainant agreed to credit these bills with ten cents per ton on condition that the N. C. & St. L. Railway would agree thereto. The bill charged:

"Or in other words, Cincinnati Southern Railway rendered bills monthly for ores shipped at a rate of $.70 per ton, and then credited such bills with $.10 per ton (Conditioned as aforesaid, however) and complainant paid the difference. In this way matters progressed for many months and until the difference or the $.10 per ton on ore thus shipped, amounted to between $4000 and $5000."

The bill then alleged that the cross-complainant had begun suit in the United States Circuit Court at Cincinnati, Ohio, to recover on this account $4933.08 with interest on the various items.

The bill alleged that the increased rate of seventy cents was illegal and that the said Dayton Coal & Iron Company could not be legally required to pay this demand, the bill praying that the cross-complainant's suit at Cincinnati be enjoined and

"That on the final hearing such injunction be made perpetual, and that the subject matter of said suit to be herein enjoined, to-

gether with the facts and circumstances surrounding and pertaining thereto, as herein shown, be inquired into and determined in this cause, and if defendants or either of them have any claim whatsoever against complainant because of the matters herein shown, that same be presented and determined herein. And that on the final hearing it be decreed that neither of defendants has any claim in law or equity against complainant, because of the matters herein shown."

Cross-complainant refers ro said bill for a more complete statement of its contents.

Cross-complainant answered the bill and insisted that on March 5, 1907, the Nashville, Chattanooga & St. Louis Railway
151 changed the through rate on ore from Cartersville and nearbu points to Dayton from sixty cents per ton to seventy cents per ton. The answer stated that on that date said N. C. & St. L. Railway filed with the Interstate Commerce Commission and published the joint rate referred to, and that said rate was binding on both the railroad companies affected thereby, and that under the law of the United States it would have geen illegal for the cross-complainant to have accepted in settlement a less amount than that stipulated for by this published rate. This change in rate did not increase the amount of compensation received by the cross-complainant. Its part of the sixty cent rate was twenty cents per ton, and its part of the seventy cent r-te was twenty cents per ton. All of the increase went to the Nashville, Chattanooga & St. Louis Railway. The answer insisted that cross-*examination* settled with the N. C. & St. L. Railway on this basis and paid over to that road fifty cents per ton on all the ore shipped from Cartersville and nearby points to Dayton after March 5, 1907. Cross-complainant refers to this answer for a full statement of its contents.

The defendants Western and Atlantic and Nashville, Chattanooga and St. Louis Railway Companies also answered and made the same allegations with reference to the change in the rate, and denied that the rate of seventy cents per ton was for any reason illegal, and this answer is also referred to for its contents.

Considerable proff has been taken on the part of all three of the parties. The final preparation of the case on the part of the cross-complainant has been delayed and embar-assed on account of the death in September, 1912, of Mr. Robert Pritchard who had for years been active General Attorney in Tennessee for the cross-complainant, and who had charge of this cause for cross-complainant.

Cross-complainant is now advised that it is necessary and proper for the enforcement of its rights kn the premises and that justice may be done all parties concerned, th-t it now present to this Court and file a cross-bill against the Dayton Coal & Iron Company,
152 Limited, and the defendant Nashville, Chattanooga & St. Louis Railway. And by way of cross-bill it reiterates the allegations in its *owner* heretofore filed in this cause and relies thereon and charges that after March 5, 1907, the defendant Dayton Coal & Iron Company, Limited, shipped iron ore from Cartersville, Georgia, and other nearby points on the line of railway leased and

operated by the defendant Nashville, Chattanooga & St. Louis Railway via Chattanooga to Dayton, Tennessee, over the lien of the said Nashville, Chattanooga & St. Louis Railway to Chattanooga and over the line of cross-complainant from thence to Dayton; that at the time this ore was shipped the rate issued and published by the Nashville, Chattanooga & St. Louis Railway was seventy cents per ton, and that under the law cross-complainant was required to charge this rate and to collect accordingly; and pursuant to and by virtue of this rate it issued bills to the defendant Dayton Coal & Iron Co., Ltd., for seventy cents per ton from time to time, and that the said Dayton Coal & Iron Company declined to pay this rate but insisted that the legal rate was only sixty cents per ton and deducted ten cents per ton making its payments to the cross-complainant; that these differences amounted to the following sums at the dates shown:

$263.21	on	May	15th,	1907.
$399.01	"	June	"	"
$508.64	"	July	"	"
$469.71	"	Aug.	"	"
$1253.27	"	Sept.	"	"
20.19	"	Oct.	"	"
490.14	"	Nov.	"	"
420.73	"	Dec.	"	"
284.53	"	Jan.	"	1908
266.87	"	Mar.	"	"
447.02	"	Apl.	"	"
30.48	"	Sept.	"	"
22.85	"	Oct.	"	"
17.73	"	Jan.	"	1909
38.80	"	June	"	"

Making a total of principal due—$4933.08, with interest
153 from the above shown dates respectively.

Cross-complainant charges that it was required to and did settle with the Nashville, Chattanooga & St. Louis Railway at the time this ore was shipped, in its weekly settlements with said Nashville, Chattanooga & St. Louis Railway. Only a few days ago the Agent of the said Nashville, Chattanooga & St. Louis Railway was examined as a witness in this cause, on behalf of said Railway, and testified that these sums were collected from Cross-complainant by said defendant Railway in the weekly settlements between said tow Railway Companies.

Cross-complainant therefore charges that these sums, with interest, are due from the defendant Dayton Coal & Iron Company, Limited, because said rate of seventy cents per ton, under which said charges were made, was a rate published by the defendant Nashville, Chattanooga & St. Louis Railway and filed by it with the Interstate Commerce Commission, and that cross-complainant was bound under the law to comply with said rate.

Cross-complainant charges, however, that if the Court should find that for any reason this was not a legal rate then, cross-complainant,

having paid same to the Nashville, Chattanooga & St. Louis Railway by virtue of said Company's claim under the rate published and insisted upon by said Company, then in that event, said Nashville, Chattanooga & St. Louis Railway is indebted to cross-complainant for the above named sum and interest from the dates shown.

The premises seen, complainant prays that this be files as a cross-bill against said Dayton Coal & Iron Company, Ltd., and Nashville, Chattanooga & St. Louis Railway, and if necessary let process issue returnable to an early rule day, and let said defendants answer, but not under oath. On final hearing give cross-complainant a judgment against the Dayton Coal & Iron Company, Limited, for said sum of $4933.08, with interest from the dates herein shown; but if the Court should find cross-complainant is not entitled to this relief as against the said Dayton Coal & Iron Company, Limited, because of the illegality of the rate published and insisted upon by
154 the defendant Nashville, Chattanooga & St. Louis Railway, then let cross-complainant have judgment for said sum, with interest, against said defendant Nashville, Chattanooga & St. Louis Railway. Grant all other further and special relief the cross-complainant may be entitled to, and grant general relief.

PRITCHARD, ALLISON & LYNCH,
Sol'rs for Cross-Compl't.

STATE OF TENNESSEE,
Hamilton County:

Personally appeared J. J. Lynch, who makes oath in due form of law that he is one of the attorneys for the Cincinnati, New Orleans & Texas Pacific Railway Company, and that the facts set forth in the foregoing cross-bill are true to the best of his knowledge, information and belief.

J. J. LYNCH.

Sworn to and subscribed before me this February 20th., 1913.
SAM ERWIN, *C & M.*

We hereby acknowledge and bind ourselves, security for the payment of all costs that may be adjudged against the complainants in this suit.

This 24th. day of Feb'y, 1913.
PRITCHARD, ALLISON & LYNCH.
Per P. E. M.

Answer of Dayton Coal & Iron Co., Lt'd., to Cross-bill. Filed Feb. 2nd, 1913.

Answer of the Dayton Coal & Iron Company, Limited, to Cross-bill of C., N. O. & T. P. Railway Co.

The Dayton Coal & Iron Company, Limited, defendant, original complainant in above suit, by way of answer to the cross-complainant in above suit, by way of answer to the cross-complaint of Cincinnati, New Orleans & Texas Pacific Railway Co. says:

It admits the filing of the original bill by it and the answer to thereto of cross-complainant C. N. O. & T. P. Railway Co., and also defendant Nashville, Chattanooga & St. Louis Railway and Western & Atlantic Railroad Co.

It further admits that considerable proff has been taken in said cause and that same is now ready for trial so far *far* as this
155 respondend is concerned.

But respondend refers to tje original pleadings for their contents and relies on the entire record herein for a more accurate and correct statement of the issues involved up to this time. Respondent denies that there was a valid through rate on ore shipments from Cartersville, Georgia, and other points to Dayton, Tennessee, of $.70 per ton, beginning with March 5 1907. It denies that it should be charged on ore thus shipped at $.70 per ton.

It denies that cross-complainant is entitled to recover anything whatsoever against it.

It avers that the alleged rate of $.70 per ton was invalid for many reasons, some of which are as follows:

(1) Said rate was never legally promulgated by the initial line and established as required by law in such cases.

(2) Said rate of $.70 was never concurred in by the connecting carrier, the Cincinnati, New Orleans & Texas Pacific Railway Co., but was expressly non-curred in.

(3) Said rate was never kept posted, on file and open to public inspection, as required by the law to make it obligatory on this respondent as a shipper, by either the initial or the connecting carrier.

(4) A rate of $.60 was quoted to this respondent by cross-complainant and said rate was kept posted and on file by cross-complainant as the only and valid rate governing these ore shipments, and under such circumstances, even if a rate of seventy cents was the valid rate, this respondent was deceived by cross-complainant, was ignorant of the $.70 rate, and cross-complainan is therefore estopped to insist on a rate of seventy cents as against this respondent.

(5) The alleged through rate of seventy cents is in excess of the sum total of the local rates from Cartersville and other points to Chattanooga and from Chattanooga to Dayton, which fact of itself renders the proposed through rate shockingly unreasonable, unconscionable and illegal.

(6) At the same time the initial carrier in this case and the
156 cross-complainant now claim the $.70 rate aforesaid was in force by reason of the initial carrier's alleged tariff, the cross-complainant had promulgated and on file with the Interstate Commerce Commission a through rate of $.60 per ton on ore from Cartersville and other points in controversy to Dayton, as if the initial carrier did promulgate a through rate of $.70 the connecting carrier, the cross-complainant, had promulgated a different through rate, the former being $.70 and the latter $.60 per ton.

Respondent relied on the latter rate, and submits it should not be deprived — the benefits thereof to its detriment.

The foregoing are only some of the reasons why cross-complainant should not have any relief against this respondent. Others *wukk*

be shown in the proof and still others are stated in the original bill, on which this respondent now relies by way of its defense to the cross-complaint.

And now, having fully answered, it prays for the same relief as asked in its original bill, the prayer os which -s here adopted as a part of this answer.

W. B. MILLER,
Solicitor for the Dayton Coal & Iron Company, Limited.

STATE OF TENNESSEE,
Hamilton County:

W. B. Miller, being sworn, says he is agent and solicitor for cross-respondent the Dayton Coal & Iron Company, Limited, and that the facts stated in the foregoing answer are true to the best of his knowledge, information and belief.

W. B. MILLER.

Sworn to and subscribed before me this 25 day of February, 1913.
SAM ERWIN, *C. & M.*

Answer of N., C. & St. L. R'w'y Co. to Cross-bill of C., N. O. & T. O R'w'y Co., Filed May 10th, 1913.

The answer of the Nashville, Chattanooga & St. Louis Railway to the cross bill filed against it and the Dayton Coal & Iron Company by its co-defendant, Cincinnati, New Orleans & Texas Pacific Railway Company in the above entitled cause.

This defendant for answer to so much and such parts of
157 said cross bill as it is advised — necessary for it to answer says:

That the contents of the original bill, the answer, *ect.* heretofore filed in this cause are substantially as set forth in the cross bill, but this defendant relies upon said bill and answer for a complete statement of their contents.

It is true, as charged in the cross bill and as heretofore set forth in the pleadings, that the complainant shipped iron ore from Cartersville and other points to Dayton, Tennessee, and that at that time and during the period when said shipments moved, that the rate issued, published and on file with the Interstate Commerce Commission upon iron ore shipped from these points to Dayton was 70¢ per ton; and it is further true that under the law, the C. N. O. & T. P. R'y its co-defendant were required to charge this rate and collect accordingly.

This defendant supposes it to be true that bills were rendered to the complainant Dayton Coal & Iron Co., at the rate of 70¢ per ton from time to time, but does not know what position the Dayton company took as to what the legal rate was and it does not know what agreement was made between the C. N. O. & T. P. R'y Co.

and the Dayton Company, with reference to settlement of the disputed question of the legal rate or the payment of the freight bills.

This defendant is not able to say whether the amount of indebtedness set forth on page 5 of the cross bill is correct or not, as it had no dealings of any kind with the Dayton Coal & Iron Co.

It is true as stated in the cross bill that this defendant required the C. N. O. & T. P. R'y Co. to settle with it weekly for all ore shipped to the Dayton Coal & Iron Company from Cartersville and other points to Dayton, Tennessee.

At the time the shipments in controversy in this case moved, this defendant, as stated in the cross bill had published, filed and established a rate of 70¢ per ton upon iron ore shipped from Cartersville, Rogers, Emerson and other points to Dayton, Tennessee, which was the legal rate upon this commodity from the date the tariff
158 took effect up until this time. This tariff schedule as filed with the Interstate Commerce Commission at Washington, D. C. in accordance with the requirements of the acts of Congress is entitled, "N. C. & St. L. R'y Iron Ore Tariff No. 8, I. C. C. No. 1351-A, filed February 4, 1907, to take effect March 7, 1907".

This defendant further shows that under the Act to regulate commerce passed and approved by the Congress of the United States February 4, 1887, effective April 5, 1887, and the amendments thereto, and under the Elkins Act/ 33 Statutes at Large, 847 and the amendments thereto, which laws were enacted by the Congress of the United States under the right reserved to it by the commerce clause of the Federal Constitution to regulate and control commerce between the states the reasonableness or unreasonableness of this rate of 70¢ per ton upon iron ore or the legality of said rate or any question relating thereto is a matter exclusively and wholly within the jurisdiction of the Interstate Commerce Commission and the United States Federal Courts.

Immediately upon the publication of this tariff and when the same became effective, this defendant began to bill the iron ore to the Dayton Company at the rate of 70¢ per ton, and each of the shipments was received by the C. N. O. & T. P. R'y Co. upon the basis of the rate of 70¢, and this defendant was settled with by the C. N. O. & T. P. R'y Co. upon the basis of this rate; that is, 70¢ per ton. T. C. N. O. & T. P. R'y Co. accepted this traffic and made settlements under this joint tariff rate in which it is shown to be a participating carrier. The said C. N. O. & T. P. R'y Co. filed an objection with the Interstate Commerce Commission against said tariff schedule and on the other hand, as before stated, accepted traffic and acquiesced in said rate.

The defendant C. N. O. & T. P. R'y Co. has never questioned the legality of the rate of 70¢ per ton as established by the defendant Nashville, Chattanooga & St. Louis Railway, but on the other hand, this rate has been all the time recognized by it as the legal, binding and only existing rate upon iron ore from the points
159 named on the schedule to Dayton, Tennessee, and other points on the C. N. O. & T. P. R'y.

This defendant denies that it is indebted or could be indebted to the cross complainant C. N. O. & T. P. R'y Co. for the money paid to it by the C. N. O. & T. P. R'y Co. on account of the shipments in controversy, because the sums of money paid to it by said company were legally due and could not be discounted by this defendant under the law.

The original bill filed in this cause charges that the defendant C. N. O. & T. P. R'y Co. entered into a contract with the Dayton Coal & Iron Co. to haul or have hauled iron ore from the various points in Georgia to Dayton at the rate of 60¢ per ton and a recovery and injunction is sought upon this ground, and this defendant avers that if the C. N. O. & T. P. R'y Co. did, as a matter of fact, enter into such a contract with the Dayton Co. whereby ot undertook and agreed to have ore shipped to the Dayton Company at the rate of 60¢ per ton, such a contract was in violation of the law, unauthorized so far as the defendant N. C. & St. L. R'y is concerned, and cannot be binding upon it. This defendant cannot in any manner be affected by any contract or arrangement that may have been made by its co-defendant and the Dayton Company, its co-defendant having no authority or right from it or under the law to make a contract covering shipments originating upon its lines. If the cross-complainant C. N. O. & T. P. R'y Co. hasm by its conduct or in its transactions with the Dayton Company, estopped itself under the law to claim or to collect from that company upon the basis of the legal rate of 70¢ per ton, the rights of this defendant as it now avers cannot be bridged or affected thereby. Defendant having made the rate in the absence of an appropiate finding by the Interstate Commerce Commission that the rate was unreasonable or illegal, and was bound to charge upon all shipments transported under this rate in accordance with its terms. The iron ore was shipped entirely from points upon this defendant's line or upon the line of the Western & Atlantic R. R. Co. operated by the defendant Nashville, Chattanooga & St. Louis Railway, and this defendant alone, under the law, could make rates upon commodities originating from points
160 upon its line. The defendant C. N. O. & T. P. R'y Co. had no authority or right under the law to make rates for the defendant N. C. & St. L. R'y and the defendant C. —. O. & T. P. R'y Co./ having accepted traffic and made settlements with this defendant upon the basis of 70¢ per ton, the legal rate as before shown, and having recognized said rate as the valid, existing rate, both in this manner and in its pleadings heretofore filed in this court and by its written concurrence filed with the Interstate Commerce Commission is now estopped to say that said rate was not the valid, legal rate at the time the shipments in controversy moved.

Defendant avers that it is not in any wise indebted to its co-defendant for any money growing out of any settlements its co-defendant C. N. O. & T. P. R'y Co. made with it for iron ore shipped to the Dayton Company at the time mentioned and described in complainant's original bill in this cause.

Defendant, therefore, prays to be hence dismissed with its reasonable cost.

NASHVILLE, CHATTANOOGA & ST. LOUIS R'Y.

BROWN, SPURLOCK & BROWN,
Sol's for Def't.

Deposition of D. M. Stanfield, Filed May 10th, 1913.

The deposition of D. M. Stanfield, a witness for the defendants taken by agreement at the offices of Brown, Spurlock & Brown in the Times Building, in Chattanooga, Tennessee, on February 7, 1913.

Said witness, being sworn, deposed as follows:

Examination by Mr. BROWN:

Q. Please state your residence and business?

A. Residence, Chattanooga; business, station accountant for the Nashville, Chattanooga & St. Louis Railway.

Q. Do you hold this position here in Chattanooga?

A. Yes sir.

Q. Please state what the duties of your position are with reference to dealing with other railroad companies?

A. I keep the accounts in general, make settlements with connecting lines.

Q. State whether or not you made any settlements with the C. N. O. & T. P. R'y during the years 1-07 and 1908 on account
161 of iron ore shipped from Cartersville, Emersonm and Rogers, Georgia. on the W. & A. R. R. to the Dayton Coal & Iron Company at Dayton, Tennessee?

A. I did.

Q. Do you remember what rate was charged per ton by the N. C. & St. L. R'y upon these cars of iron ore?

A. Yes, we are charged 50¢ a ton commencing March 1907.

Q. Do you recall what proportion of the rate the N. C. & St. L. R'y received prior to March, 1907?

A. Prior to that time, they received 40¢ per ton.

Q. And after March 1907, the N. C. & St. L. R'y received 50c. per ton?

A. 50c. per ton.

Q. Please state who paid the N. C. & St. L. R'y the 50c. per ton upon this iron ore?

A. The C. N. O. & T. P. R'y.

Q. State whether or not you personally made the settlements with the agents of the C. N. O. & T. P. R'y here in Chattanooga?

A. Well, I personally gave a draft or received a draft from the C. N. O. & T. P. R'y for the balance.

Q. How often does the Nashville road make settlements with the connecting lines on account of through shipments and how often

did you make settlements upon these shipments moving from points on the W. & A. Railroad to Dayton?

A. They make settlements four times a month, the 7th 14th., 21st and last day of the month inclusive.

Q. State whether or not the C. N. O. & T. P. R'y made settlement with you acting for the Nashville road for these shipments during 1907-8-9?

A. Yes, sir, they did.

Q. State whether or not during 1907-8 any iron ore was shipped from these same points to points on the C. N. O. & T. P. R'y for which the Nashville road charged a rate of 50c. per ton as its proportion of the haul?

A. I did verify that; I noticed looking through the Dayton cars a few cars went to Rockwood and I couldn't say what rate
162 they moved on because I didn't verify that part of it. I noticed a very few cars, though, during that time.

Cross-examination by Mr. W. B. MILLER:

Q. Now, you speak of verifying the rate that was charged on ore to Rockwood; how do you verify that, Mr. Stanfield?

A. I verify by the number of tons in the car, take the weight, see what it figures out.

Q. How do you ascertain the rate at that time as to shipments that moved during the period in controversy to Rockwood or Dayton; from what source do you get the rate now?

A. Take the weight and verify that by the amount of money we charged them on the car.

Q. Is that the only means of verification you have now?

A. Yes sir.

Q. Doesn't your office keep on file here tariffs——

A. They keep on file——

Q. Tariffs covering the period——

A. What I mean, we did after we charged them 50c. a ton, settled on 50c. a ton.

Q. But you said that you found some cars that moved to Rockwood during the period in controversy, a few cars, I believe you said, and that you did not verify the price at which freight was charged; now, I want to know how you would ascertain at this time what rate of freight was charged on those cars; couldn't you do it most readily by looking at your tariff sheets for that period?

A. Yes, we could do that and verify it, too, by taking the amount of money we charged on the car, the weight of it.

Q. Then you do have access to the tariff sheets here that would cover shipments during that period, as I understand.

A. Yes, I could get them but that is handled by a different department.

Q. Well, now/ I will ask you if you will examine those tariff sheets and in making your answer as to the rate charged to Rockwood on ore from these same points that are now in controversy to

say if you did not charge—your road did not charge only 40c per ton on the Rockwood shipments and in that connection refer to the tariffs wherein you find a different rate from 40c. on ore
163 that moved from these points to Rockwood?

A. *i* will have to examine the tariffs and find that out.

Q. That is what I say, and when you have examined the tariffs you can give the number -f them so that they can be readily verified by inquiry of the Interstate Commerce Commission, can you?

A. Yes sir.

Q. Do you have any personal recollection of the circumstances attending the increase of freight from Cartersville and other points on ore that was shipped over your line for Dayton, Tennessee, whereby it was changed from 40c to 50c?

A. No sir I do not.

Q. You do not know whether it is a fact that your line waited until is was advised that the Dayton Company had bought a large quantity of ore at Cartersville and sold pig iron against it and then increased the rate from 40c to 50.

A. No sir I don't know anything about that.

Q. Now when was this settlement made of the freight on this shipment of ore from Cartersville, Emerson and Rogers to Dayton, Tennessee ofer your line and via C. N. O. & T. —. Ry. as between your line and the C. N. O. & T. P. Ry.? When did you make settlement for that ore?

A. Some of it is included, I think, in most every week's settlement from March 1907, to December 1908.

Q. What I am trying to ascertain is whether you have any personal recollection on the subject?

A. What *why* do you mean?

Q. Do you personally remember about adjusting the accounts and settlong the accounts between your line a-d the C. N. O. & T. P. Ry. for that ore—those shipments of ore?

A. I knos that they are in the settlements to tje Q. & C. that they were settled for once a week; I stated a minute ago some weeks there might not have been any ore moving, but when moving, they were settled for regularly once a week.

Q. Paid for at the end of the week?

A. Yes sir.

Q. That is your best recollection on the subject?
164 A. Yes sir.

Q. Now, Mr. Stanfield, I am impressed that this is the condition; that your line was claiming 50c. per ton on that ore on the haul to Chattanooga, and billed the ore to the C. N. O. & T. —. Ry. at that rate and the C. N. O. & T. P. Ry. failed to collect more than 40c. as your road's proportion, and thereupon accounted for onlu 40c. and that this was the practice until long after this ore was entirely delivered, thereby leaving open a difference of 10c. per ton between the two lines; now, do you say that that was not the case?

A. That is not the case; we collected 50c.

Q. Can you swear that?
A. Yes sir.
Q. As the ore was delivered from one line to the other?
A. Yes sir.
Q. You have entries in your office, I suppose that will bear out that statement?
A. Yes sir I have.
Q. Would you object to my coming with you to inspect those entries in your office?
A. No, I would not have any objections if it is agreeable to Mr. Brown.
Q. Is that agreeable, Mr. Brown?
Mr. BROWN: I suppose so; I don't know of any reason why it should not; it is just a question of your understandin*d* the railroad records.
Q. When you made settlements, did you pass receipts, Mr. Sran-fil*ed*?
A. No, we gave a draft; we signed statem*w*nts for each other once a week; if the Q. & C. owed us, they gave -s a draft and if we owed them, we gave them a draft.
Q. Draft on whom?
A. The treasurer on each line.
Q. Do you know whether these drafts were paid?
A. I know we got credit for them through the banks here.
Q. Without any question?
A. Yes sir.
165 Q. And that each time you settled on the basis of 50c?
A. Yes sir.
Q. Who was the representative of the C. N. O. & T. P. Ry. in making those settlements?
A. I don't remember now who the agent was at that time.
Q. I am talking about the party you settled with who represented the C. N. O. & T. P. Ry.?
A. I am not sure now whether it was Mr. Gates or Mr. Hart. Mr. Gates is the presen- station accountant of the Q. & C. I don't remember just how long he has held that position.
Mr. BROWN: Before that it was Mr. Hart?
A. Yes sir.
Q. Where is Mr. Hart now?
A. He is with the Hamilton National Bank.
Q. You never knew *any of* controversy between your line and the C. N. O. & T. P. Ry. over the difference of 10c. per ton on ore shipped during this period?
A. No sir.
Q. Never heard of any controversy about it?
A. No sir never did until Mr. Brown told me; never heard it from the agent's office until after the suit came up.
Q. You never heard anything about it until very recent-ly did you?
A. No.

Examination by Mr. J. J. LYNCH for the C., N. O. & T. P. Ry:

Q. In making your weekly settlements, if you were indebted to the C. N. O. & T. P. Ry. you would deduct the amount that that company was due you for freight on this ore from the balance you owed that company

A. Yes sir and give them the net difference.

Q. Give them a draft for the difference?

A. Yes sir.

Q. And in doing this you would deduct at the rate of 50c. per ton?

A. Yes sir.

Further deponent sayeth not.

D. M. STANFIELD.

166 Sworn to and subscribed before me.

——— ———.

The said witness D. M. STANFIELD being recalled to answer as to the rate charged during the -eriod in controversy on ore from Cartersville and other points to Rockwood, Tennessee, and about which he was interrogated on former cross-examination and agreed to examine tariffs and report, states as follows:

Mr. STANFIELD: I found the old tariffs we have on file giving a through rate to Rockwood dated 1909 when it went into effect.

Mr. MILLER: Well, now, you said that you could verify by weight and charges the prices charged on ore per ton from Cartersville and other points during the time this Dayton ore moved: I will get you to state what that rate was, if you did verify it.

A. Dayton or Rockwood?

Q. Rockwood.

A. We charged 50c. per ton, our proportion.

Q. Over that period of time that ore move-?

A. Well, in December, 1908, was the first I found.

Q. That is the first ore that you find having moved to Rockwood?

A. Rockwood, yes.

Q. That was charged at the same price as from Cartersville to Dayton?

A. Yes sir.

Q. Who received that ore at Rockwood? who was the consignee?

A. Roane Iron Company.

Q. From what point?

A. Rogers, Georgia.

Q. Was there much or little of that shipment?

A. I can't say whether — was very much of it o*t* not. The first I found was 1908 and I didn't look any further.

Q. T*t*he only shipments or shipment that you recall were during December, 1908?

A. December 1908.

Q. Isn't it a fact that your road keeps on file copies of the various tariffs that it promulgates as far back as 1906-7?

167 A. Well, I think they do; that is done in Nashville.

Q. It is a fact that all well regulated railroad offices preserve copies of all tariffs that they promulgate, isn't it, in the general freight offices?

A. They do in the general freight offices, yes sir.

Mr. BROWN: The first joint tariff that you found was for 1909?

A. Yes, sir, that is the oldest one I found on file.

Q. Did you make a search here in the office for one made prior to that time?

A. Yes sir.

Q. That is to Rockwood?

A. Yes.

Q. Do you know whether the company had any joint rate in connection with the C. N. O. & T. P. Ry. to Rockwood prior to that time or not?

A. No, I do not.

Further deponent sayeth not.

D. M. STANFIELD.

Sworn to and subscribed before me Feby. 7, 1913.

SAM ERWIN, *C. & M.*

168 *Certified Copy Schedule Rates of Interstate Commerce Commission. Filed May* 10, 1913.

168*a* Form 702.

Rate Issue 29205. Supersedes No. 29098.

Amendment No. 4 to I. C. C. No. 1351-A. Supersedes amend. 3 *tp* I. C. C. No. 1351-A.

Supplement No. 5 to Iron Ore Tariff No. 8 of the Nashville Chattanooga & St. Louis Ry.

Rates of Freight from Nunnelly, Tenn., to Allens Creek, Tenn., on Iron Ore, C. L. Minimum Weight, as per Tariff, per Ton 2,240 *Pounds,* 30 *cents.*

Issued May 16, 1907, by Charles Barham, General Freight Agent.

Interstate June 19, 1907.

Effective Interstate May 19, 1907.

Approved by H. F. Smith, Vice Prest. and Traffic Manager, Nashville, Tenn.

(150.)

9544-M. C. B.

Agents named, reps

Ex List:

File Pro 42073-A.

Authority.

168*b* Rate Issue No. 28137. Supersedes Rate Issues No. 7056, 27661 and 27682.
I. C. C. No. 1351-A. Supersedes I. C. C. No. 1314-A and Amendments No-. 2 and 3.

Joint Freight Tariff of the Nashville, Chattanooga & St. Louis Railway in Connection with Alabama Great Southern R. R.; Cincinnati, New Orleans, Texas Pacific Ry.; Louisville & Nashville R. R.; Seaboard Air Line Ry.; Southern Ry.

Publishing Rates on Iron Ore, C. L. (Per Ton of 2,240 Pounds).

Iron Ore Tariff No. 8.

From Miscellaneous Points to Points Shown Herein.

The Traffic Officials of lines made party hereto will certify to the interstate Commerce Commission their concurrence in the rates publishee hereidn.
Issued February 2, 1907, by Charles Barham, General Freight Agent, Nashville, Tenn.
Effective, March 5, 1907.

Approved:
H. F. SMITH,
Traffic Manager.

Information regarding these rates may be obtained from E. T. Eckles, Assistant General Freight Agent; E. M. Smith, Assistant Gen. Freight Agent, Nashville, Tenn., and Traffic Agents whose addresses are published in the original Tariff.
Ex. List—Agents Bartow, Emerson, Cartersville.
Rogers, Atlanta, Dalton, Rome, Chatta.
South Pittsburgh, Goodrich, Nashville.
Gadsden, Allens Creek, Cowan, Lyle.
Nunnelly, Riverside, G. R. B., H. A. P. E. S. W. W. K., W. E. E. C. R. C.
D. M. G. Southern Steel Co. Tenn., C. I. & R. R. Co. Reps.
(200)
File No. 975 and 25385-M.
Pro No. 39786-A.

Ambrose & Bostelman Co. Print.

168*c* Form 702.

State Issue No. 28660. Supersedes in conflict No. 28137.
Amendment No. 2 to I. C. C. No. 1351A. Supersedes in conflict I. C. C. No. 1351A.

Supplement No. 3 to Iron Ore Tariff No. 8 of the Nashville, Chattanooga & St. Louis Railway in Connection with Seaboard Air Line Railway.

Rates of Freight from Bartow, Emerson and Rogers, Ga., to Birmingham, Bessemer and Ensley, Ala., on Iron Ore, Carloads.

Minimum weight as per Tariff per ton of 2240 pounds, 95 cents.

The Traffic Official of line made party hereto will certify to the Interstate Commerce Commission concurrence in the rate published herein.

Issued March 23, 1907, by Charles Barham, General Freight Agent, Nashville, Tenn.

Effective April 26, 1907.

Approved by
H. F. SMITH,
Vice-Pres't and Traffic Manager.

Ex List: Agts. Bartow, Emerson, Rogers, Cartersville, L. K. W. C. R. C. Reps. J. G. C.
(150). File 975-M C. B.
Authority Pro 41272-A.

168*d* Form 702.

Rate Issue No. 20098. Amended R/1 No. 28137.
Amendment No. 3 to I. C. C. No. 1351-A. Amends I. C. C. No. 1351-A.

Supplement No. 4 to Iron Ore Tariff No. 8 of the Nashville Chattanooga & St. Louis Ry.

Rates of Freight from Nunnelly, Tenn., to Goodrich, Tenn., on Iron Ore, Carload.

Minimum weight as per Tariff per Ton 2240 Pounds, 30 cents.

Issued May 7, 1907, by Charles Barham, General Freight Agent, Nashville, Tennessee.

Effective June 11, 1907.

Approved:
H. F. SMITH,
Vice-Prest. and Traffic Manager.

Ex. List: Agents, Nunnelly, Goodrich, Reps.
(150.)
File 9544-M. C. B.
Authority Pro 42073-A.

168*e* Form 702.

Rate Issue No. 28376. Amends R/1 No. 28137.
Amendment No. 1 to I. C. C. No. 1351-A. Amends I. C. C. No. 1351-A.

Supplement No. 1 to Iron Ore Tariff No. 8 of the Nashville, Chattanooga & St. Louis Ry. in Connection with Transportation Lines Indicated in Tariff.

Rates of Freight on Iron Ore, Carload, from Miscellaneous Points to Points Shown Therein.

Refer to Iron Ore Tariff No. 8 (I. C. C. No. 1351-A) applying as above and Change effective date to read March 7th, 1907.
Issued Feb'y 26, 190*y*, by Charles Barham, Gen. Fr't Agent, Nashville, Tenn.
Effective Feb'y 26, 1907.

Approvey by
H. F. SMITH,
Vice-Prest. and Traffic Manager.

Ex. List: W. E. E., C. R. C., D. M. G., So. Steel Co., G. R. B., H. A. P., E. S., W. W. K., T. C. & I. Co.
Agents Bartow, Emerson, Cartersville.
Rogers, Atlanta, Dalton, Rome, Chatta., So. Pittsb.
Goodrich, Nashv., Lyle, Gadsden, Allens Creek.
Cowan, Nunnelly, Riverside, Reps.
File 73-M. C. B.
Pro authority, 39786-A.
(200.)

168*f* Form 702.

Rate Issue No. 29477. Supersedes in conflict R/1 No. 28157.
Amendment No. 5 *yo* I. C. C. No. 1351-A. Supersedes in conflict I. C. C. No. 1351-A.

Supplement No. 6 to Iron Ore Tariff No. 8 of the Nashville, Chattanooga & St. Louis Ry. in Connection with Louisville & Nashville Railroad.

Rates of Freight from Allens Creek, Lyle, Nunnelly, Riverside and Spring Creek, Spur (Running out from Bates, 2 Miles South to Lyle, Tenn.), Tenn., to Clarksville and Cumberland Furnace, Tenn. (via Pond, Tenn.), on Iron Ore, Carload, per Ton 2,240 Pounds.

Station Tariff File No. 34.
Issued June 10, 1907, by Charles Barham, General Freight Agent, Nashville, Tenn.

Agents Nunnelly, Riverside, Allens Creek, Lyle. D. M. G. Reps. L. K. W.
(150.)
Effective: Interstate July 14, 1907; Interstate June 16, 1907.

Approved by
H. F. SMITH,
Vice-President and Traffic Manager.

Ex. List: (Continued on Sheet No. 2.)
File Pro 42040-A.
Authority.

168*g* Sheet No. 2.

Pro 42040-A.

From—	To—	Per ton 2240 pounds. Iron ore C. L. minimum weight (see note 1) except where otherwise specified. Clarksville, Tenn.	Cumberland Furnace, Tenn.
Allens Creek,	Tenn.	..	60
Lyle,	"	60	..
Nunnelly,	"	60	50
Riverside,	"	..	60
Spring Creek spur, (Running out of Bates 2 miles south of Lyle, Tenn.)	"	60	

NOTE.—Minimum weight 10 per cent. more or less than marked capacity of car. Excess of 110 per cent of marked capacity of car will be charged at double tariff rates.

Cars to be loaded to their visible capacity, provided this will not result in their being loaded in excess of 10 per cent above their marked capacity nor the total weight of car and contents in excess of 60 tons. Shipments to be weighed enroute and freight charged for actual weight.

168*h* Form 702.

Nashville, Chattanooga & St. Louis Ry. Freight Tariff Department.

Rate Issue No. 29667. Supersedes in conflict R/1 No. 28137.
Amendment No. 6 to I. C. C. No. 1351-A. Supersedes in conflict I. C. C. No. 1351-A.

Supplement No. 7 to Iron Ore Tariff No. 8, in Connection with Alabama Great Southern R. R.; Chattanooga Southern R. R.; Southern Railway.

Rates of Freight from Bartow, Cartersville, Emerson and Rogers, Ga., to Alabama City, Attalla and Gadsden, Ala.

From—		Per ton 2240 pounds.
Bartow,	Ga.	Iron Ore C. L. Minimum Weight (see note 1 on page 2 of Tariff).
Cartersville,	"	
Emerson,	"	
Rogers,	"	
to		
Alabama City,	Ala.	80
Attalla,	"	80
Gadsden,	"	80

When via Chattanooga, Tenn. and A. G. S. R. R. 90 cents per ton 2240 pounds.

The Traffic Officials of lines made party hereto will certif- to the Interstate Commerce Commission concurrence in the rates published herein.

Issued July 3, 1907.
R. H. McC., F. H. D., E. S., W. W. K., G. R. B.
Agt. Rogers, Ala. City, Attalla, Gads.
L. K. W. Reps. Agts. Bartow, Emerson, J. C. W.
Station Tariff File No. 34, by Charles Barham, G. F. A.
Effective Aug. 8, 1907.
Authority Pro 42220-A.
File 975-M. C. B.

Approved by
H. F. SMITH,
V. P. & Tr. Mgr.

168*i* Form 702.

Nashville, Chattanooga & St. Louis Ry. Freight Traffic Department.

Rate Issue No. 29677. Amends R/1 No. 28137.
Amendment No. 7 to I. C. C. No. 1351-A. Amends I. C. C. No. 1351-A.

Supplement No. 8 to Iron Ore Tariff No. 8, in Connection with Alabama Great Southern R. R., Cincinnati, New Orleans & Texas Pacific Railway, Louisville & Nashville R. R., Seaboard Air Line Railway; Southern Railway.

Rates of Freight from Nashville, Chattanooga & St. Louis Railway, and W. & A. Railroad Stations Named on page 2 of Tariff to Points Named on page 2 of Tariff on Iron Ore.

Rates named in Iron Ore Tariff No. 8 (I. C. C. No. 1351-A) and supplements thereto will also apply on shipments in carload quantities at the points of origin and destination from and to warehouses and industries having track connections with the N. C. & St. L. Ry. or W. & A. R. R. or with which the N. C. & St. L. Ry. or W. & A. has track connections over other lines, with the exceptions and subject to the rules and regulations published in N. C. & St. L. Ry.'s switching Tariff No. 304-A, I. C. C. No. 1378-A effective April and storage rules published in N. C. & St. L. Ry. Circular No. 2363-A I. C. C. No. 1373-A, effective April 1st, 1907 or subsequent issues. There are no terminal charges, rules or regulations in effect at destination which in any wise, affect, change or determine the aggregate of the rates named in this tariff to points off the lines of the N. C. & St. L. Ry. or W. & A. R. R. except as published and filed with the Interstate Commerce Commission by the terminal lines signifying concurrence in these rates.

The Traffic Officials of participant lines will certify to the Interstate Commerce Commission concurrence in the rates published herein.

Effective Aug. 15, 1907.
Issued July 8, 1907.
D. M. G., Sou. Steel Co. Tenn. C. I. & R. R. Co.
Agts. Bartow*m*, Emerson, Cartersv., Rog.
Riverside G. R. B., H. A. P., E. S., W. W. K., W. E. E., C. R. C., Reps.
Agts. Atl., Dal., Rome, Chatta., So. Goodr.
Nash., Gads., Allens Crk., Cowan, Lyle, Nunn.
Statio*b* Tariff File No. 34.
By Charles Barham, General Freight Agent, Nashville, Tenn.
(200.)
Authority Pro. 40555-A.
File M. C. B.

Approved by
H. F. SMITH,
Vice Pres't and Traffic Manager.

168*j* Interstate Commerce Commission.

Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached, and more par*y*icularly hereinafter described, are tru*th* copies of schedules lawfully filed with the said Interstate Commerce Commission on dates specified below, towit:

Nashville, Chattanooga & St. Louis Ry. Iron Ore Tariff, No. 8, I. C. C. No. 1351-A, Filed on February 4, 1907.

Amendment	No.	1	to	said	I.	C.	C.	No.	1351-A	filed on	Feby. 28, 1907
"	"	2	"	"	"	"	"	"	"	"	March 25, 1907
"	"	3	"	"	"	"	"	"	"	"	May 8, 1907
"	"	4	"	"	"	"	"	"	"	"	May 17, 1907
"	"	5	"	"	"	"	"	"	"	"	June 12, 1907
"	"	6	"	"	"	"	"	"	"	"	July 8, 1907
"	"	7	"	"	"	"	"	"	"	"	July 9, 1907

In witness whereof I have hereunto set my hand and affixed the Seal of said commission this 26th day November A. D. 1912.

[SEAL.] JOHN H. MARBLE.
Secretary of the Interstate Commerce Commission.

169 *Certified Copy Concurrence Freight Rates Filed May 10th, 1913.*

169*a* Interstate Commerce Commission, Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached, and more particularly hereinafter described, are true copies of concurrence to freight-rate schedules filed by the Cincinnati, New Orleans, Texas Pacific Railway Company with the said Interstate Commerce Commission on dates specified below to-wit:

FX3-No. 326 dated August 23, 1907, Filed on September 7, 1907.
FX3-No. 389 dated August 23, 1907, filed on September 7, 1907.
FX3-No. 739, dated April 26, 1909, filed on April 28, 1909.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 27th day of February, A. D. 1913.

[SEAL.] JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

169*b* To be Filed with the Interstate Commerce Commission.

Queen & Crescent Route.

Cincinnati, New Orleans & Texas Pacific Railway Co.

General Freight Department.

CINCINNATI, O., August 23, 1907.

Form FX3-No. 326.

To the Interstate Commerce Commission, Washington, D. C.:

This is to certify that the Cincinnati, New Orleans & Texas Pacific Railway Company assents to and concurs in the publication and filing of any freight-rate schedule or supplement thereto which the Louisiana & Northwest Railway Company or its agent may make and file, in which it is shown as a participating carrier, and hereby makes itself a party to and bound thereby in so far as such schedule contains rates applying via its line and to, but not from, points thereon, until this authority is revoked by formal and official notices of revocation placed in the hands of the Interstate Commerce Commission and of the carrier to which this concurrence is given.

Under power of attorney filed with the Interstate Commerce Commission, this Concurrence will also serve as the concurrence of the lines named below in all freight-rate schedules applying to but not from points on the lines named.

KENTUCKY & TENNESSEE RAILROAD,
TENNESSEE RAILWAY COMPANY,
CINCINNATI, NEW ORLEANS & TEXAS
PACIFIC RAILWAY COMPANY,
By H. A. POVELEITE, *G. F. A.*,
Per F. D. CLAGGETT.

169*c* To be Filed with the Interstate Commerce Commission.

Queen & Crescent Route.

Cincinnati, New Orleans & Texas Pacific Railway Co.

General Freight Department.

CINCINNATI, O., August 23, 1907.

Form FX3-No. 389.

To the Interstate Commerce Commission, Washington, D. C.:

This is to certify that the Cincinnati, New Orleans & Texas Pacific Railway Company assents to and concurs in the publication and filing of any freight-rate schedule or supplement thereto which the Nashville, Chattanooga & St. Louis Railway Company or its agent may make and file, in which it is shown as a participating

carrier, and hereby makes itself a party to and bound thereby in so far as such schedule contains rates applying via its line and to, but not from, points thereon, until this authority is revoked by formal and official notices of revocation placed in the hands of the Interstate Commerce Commission and of the carrier to which this concurrence is given.

Under power of attorney filed with the Interstate Commerce Commission, this concurrence will also serve as the concurrence of the lines below in all freight-rate schedules applying to but not from points on the lines named.

KENTUCKY & TENNESSEE RAILROAD,
TENNESSEE RAILWAY COMPANY,
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
By H. A. POVELEITE, *G. F. A.*,
Per F. D. CLAGGETT.

169*d* To be Filed with the Interstate Commerce Commission.

Queen & Crescent Route.

Cincinnati, New Orleans & Texas Pacific Railway Co.

General Freight Department.

CINCINNATI, OHIO, April 26, 1909.

Form FX3-No. 739.
Cancels FX3-No. 389.

To the Interstate Commerce Commission, Washington, D. C.:

This is to certify that the Cincinnati, New Orleans & Texas Pacific Railway Company assents to and concurs in the publication and filing of any freight-rate schedule or supplement thereto which the Nashville, Chattanooga & St. Louis Railway Co. or its agent makes and files, in which it is shown as a participating carrier and hereby makes itself a party to and bound thereby in so far as such schedule contains rates applying via its line and to, but not from, points thereon, until this authority is revoked by formal and official notices of revocation placed in the hands of the Interstate Commerce Commission and of the carrier to which this concurrence is given.

Under power of attorney filed with the Interstate Commerce Commission this concurrence will also serve as the concurrence of the lines named below in all freight-rate schedules applying to, but not from, points on the lines named.

KENTUCKY & TENNESSEE RAILROAD,
TENNESSEE RAILWAY COMPANY,
CINCINNATI, BURNSIDE & CUMBERLAND RIVER RY. CO.,
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By H. A. POVELEITE, *General Freight Agent*,
Per F. D. CLAGGETT.

170 *Certified Copy of Schedule of Rates of Interstate Commerce Commission. Filed May 10th,* 1913.

170*a* Nashville, Chattanooga & St. Louis Railway.

Freight Department.

NASHVILLE, TENN., Oct. 5th, 1906.

In replying, please refer to 31028.

J. R. Knox,
Gen'l Freight Agent.

Chas. Barham,
Ass't Genl. Freight Agt.

E. T. Eckles,
Ass't Genl. Freight Agt.

S. D. Cowden,
Claim Agent.

To the Interstate Commerce Commission, Washington, D. C.:

This is to certify that the Nashville, Chattanooga & St. Louis Railway Company assents to and concurs in all joint tariffs, or other issues which in any way affect joint rates, which may hereafter be issued by other common carriers, and in which the said Nashvill*r*, Chattanooga & St. Louis Railway Company is named as party thereto expecting in cases where the said Nashville, Chattanooga & St. Louis Railway Company shall give the Commission notice to the contrary.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY CO.,
Per GEO. R. KNOX,
General Freight Agent.

170*b* Interstate Commerce Commission, Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached contains a true and correct copy of Nashville, Chattanooga & St. Louis Railway concurrence to joint tariffs, dated October 5, 1906, filed with the said Interstate Commerce Commission on October 8, 1906.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 11th. day of February, A. D. 1913.

[SEAL.] JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

171 *Certified Copy of Schedule of Rates of Interstate Commerce Commission. Filed May* 10, 1913.

171*a* Interstate Commerce Commission, Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached contain true and correct extracts from the schedules therein more particularly described, said schedules having been filed with the said Interstate Commerce Commission on dates specified in said papers, and being in force throughout periods indicated in said papers.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 11th day of February A. D. 1913.

[SEAL.] JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

171*b* Extracts from Cincinnati, New Orleans & Texas Pacific Ry. Tariff I. C. C. No. 2434, Filed on January 25, 1904, Reading as Effective January 23, 1904, and in Force to and Including January 25, 1907.

Title Page.

Queen & Cresent Fast Freight Line, Operating Over the Cincinnati, New Orleans & Texas Pacific Ry.

Rates of Freight
to
Dayton, Tenn.,
on
Raw Material.

(For the Use of Pig Iron Furnaces.)

Page 2.

Rates of Freight
on
Raw Material
to
Dayton, Tenn.

From.	On.	Rate.
	Ore, C. L.,	
Chattanooga, Tenn. (C. N. O. & T. P. Ry. Tracks.)	Minimum Weight, marked capacity of car.	Per tom 2240 lbs. 20 cents.

171c Extracts from Cincinnati, New Orleans & Texas Pacific Railway Company Tariff I. C. C. No. 3289, Filed on February 1, 1907, Reading as Effective January 26, 1907, and in force to and including May 31, 1909.

Title Page.

Cincinnati, New Orleans & Texas Pacific Railway Company
in Connection with
Western & Atlantic R. R.

Rates of Freight
to
C., N. O. & T. O. Ry. Stations, viz.,
Dayton, Tenn.,
on
Raw Material.

(For Use of Pig Iron Furnaces Only.)

Page 4.

Commodity.	From.	Rate.
Ore C. L. Minimum weight marked capacity of car.	Chattanooga, Tenn., (C. N. O. & T. P. Ry. tracks.)	Per ton 2240 pounds 20 cents.

171d Extracts from Supplement No. 17 to Cincinnati, New Orleans & Texas Pacific Railway Company Tariff I. C. C. No. 2944, Filed on April 30, 1909, and in Force Throughout Period June 1, 1909, to December 31, 1909, Both Inclusive.

Page 2.

Rates of Freight
from
Chattanooga, Tenn.
(C., N. O. & T. P. Ry. Tracks.)

Commodity.	To.	Rate.
		Per ton of 2240 lbs. except as noted.
Ore iron C. L. (See note 1.)	Dayton, Tenn.	20¢.

NOTE.—Actual weight to be charged for with a minimum weight of 20 gross tons. In the absence of scale weights the marked capacity of car will be charged for. Agents should insist on cars being loaded to their marked capacity.

171e Extracts from Cincinnati, New Orleans & Texas Pacific Ry. Co. Chattanooga Local Tariff No. 9, I. C. C. No. 3703, Filed on November 23, 1909, Effective January 1, 1910, and Still in Force on February 11, 1913.

Page 16.

Commodity Rates from Chattanooga, Tenn., Continued.

Index No.	To.	Item No.	Commodities. Rates in cents.	Rate.
4	Dayton, Tenn.	44.	Ore, iron C. L. actual weight to be charged for with a minimum weight of 20 gross tons, per ton 2240 lbs. In the absence of scale weighs the marked capacity of cars will be charged for.	20.

172 *Certified Copy of Schedule of Rates of Interstate Commerce Commission. Filed May 10th,* 1913.

172a Interstate Commerce Commission, Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto atached contain true and correct extracts from the schedules therein more particularly described, said schedules having been filed with the said Interstate Commerce Commission on dates specified in said papers, and being in force throughout periods indicated in said papers.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 11th day of February, A. D. 1913.

[SEAL.] JOHN H. MARBLE,

Secretary of the Interstate Commerce Commission.

172*b* Extracts from Western & Atlantic R. R. Local Freight Tariff I. C. C. No. 1171-A, Filed on November 6, 1905, and in Force Throughout Period November 10, 1905, to December 3, 1907, Both Inclusive.

Title Page.

Local Freight Tariff of the Western & Atlantic R. R. (Nashville, Chattanooga & St. Louis Railway, Lessee).

Local Freight Tariff No. 3.

Issued November 1, 1905.
Effective November 10, 1905.
Page 11.

Miscellaneous Commodity Rates—Continued.

Articles.	From	To	Per	Rate
Ore, Iron, C. L., min. wt. 20 gross tons.	Cartersville, Ga.	Chatt., Tenn.	Ton 2240.	.40

172*c* *Extracts from Nashville, Chattanooga & St. Louis Railway Local Freight Tariff I. C. C. No. 1489-A, Filed on November 1, 1907, and in Force Throughout Period December 4, 1907, to January 14, 1909, Both Inclusive.*

Title Page.

Local Freight Tariff of the Nashville, Chattanooga & St. Louis Railway, Lessee of Western & Atlantic R. R. Co.

Local Freight Tariff No. 4.

Page 21.

Nashville, Chattanooga & St. Louis Ry.—Atlanta Division—Local Freight Tariff No. 4.

Miscellaneous Commodity Rates—Continued.

Item No.	Articles.	From	To	Per	Rate
80	Ores—continued ore, iron, C. L. Min. wt. 20 gross tons	Cartersville, Ga.	Chattanooga, Tenn.	Ton 2240.	40

172*d* *Extracts from Nashville, Chattanooga & St. Louis Railway Supplement No. 3, to Local Freight Tariff No. 6, Filed on May 20, 1909, and in Force Throughout Period June 24, 1909, to October 7, 1909, Both Inclusive.*

Miscellaneous Commodity Rates.

Changes Effected by this Supplement.

Item No.	Cancels Item No.	Articles.	From	To	Per	Rate in cents.
78-A		Ore, iron C. L. wt. see item 11. min. wt. see item 11.	Cartersville, Ga.	Chattanooga, Tenn.	Ton 2240 lbs.	40 (see note)

NOTE.—The above rate does not include any switching charge.

172*e* *Extracts from Nashville, Chattanooga & St. Louis Railway Supplement No. 6, to Local Freight Tariff No. 6, I. C. C. No. 1678-A, Filed on September 4, 1909, and in Force Throughout Period October 8, 1909, to February 2, 1910, Both Inclusive.*

Page 3.

Reissued Items—Continued.

Effective June 24, 1909, in Supplement No. 3.

Item No.	Cancels item No.	Articles.	From	To	Per	Rate in cents.
78-A		Ore, iron, C. L. minimum weight. See item 11.	Cartersville, Ga.	Chattanooga, Tenn.	Ton 2240 lbs.	40 (see note)

NOTE.—The above rate does not include any switching charge.

172*f* *Extracts from Nashville, Chattanooga & St. Louis Railway Supplement No. 10, to Local Freight Tariff No. 6, I. C. C. No. 1678-A, Filed on December 31, 1909, and in Force Throughout Period February 3, 1910, to March 20, 1911, Both Inclusive.*

Page 2.

Item No.	Reissue.	Article.	From	To	per	Rate in cents.
78-A	C	Ore, Iron, C. L. minimum weight. See item 11.	Cartersville, Ga.	Chattanooga, Tenn.	Ton 2240 lbs.	40

NOTE.—Rate named does not include any switching charge.
C.—Effective June 24, 1909, in supplement No. 3.

172g *Extracts from Nashville, Chattanooga & St. Louis Railway Supplement No. 17 to Local Freight Tariff No. 6, I. C. C. No. 1678-A, Filed om February 15, 1911, and in Force Throughout Period March 21, 1911, to May 15, 1911, Both Inclusive.*

Page 4.

Article.	From	To	Per	Rate in cents.
Ore, Iron, C. L. minimum weight, see item 11.	Cartersville, Ga.	Chattanooga, Tenn.	Ton 2240 lbs.	40

NOTE.—Rate named does not include any switching charge.

172h *Extracts from Nashville, Chattanooga & St. Louis Railway Local Freight Tariff I. C. C. No. 1642-A, Filed on December 12, 1908, and in Force Throughout Period January 15, 1909, to April 1, 1909, Both Inclusive.*

Title Page.

Local Freight Tariff of the Nashville, Chattanooga & St. Louis Rail way, Lessee of Western & Atlantic R. R. Co.

Local Freight Tariff No. 5.

Page 7.

Rules Governing Tariff.

Minimum Carload Weight on specific commodities when reference is made to this item.

Item No. 11.

Minimum weight per car to be charged on commodities bearing reference to this item is the stenciled capacity of the equipment (except as noted). Where freight is weighed enroute or at terminal points in the absence of weighing facilities at point of origin, rendering necessary approximate loading not less than 90 per cent of the stenciled capacity may be loaded in car, in excess of 110 per cent of the car's stenciled capacity will be charged double the tariff rate. Except that where the Transportation Department furnishes cars, the sides of which will not permit the loading of as much as the stenciled weight, actual weight will be charged when such cars are loaded to visible capacity.

Pg. 20.

Miscellaneous Commodity Rates—Continued.

Item No.	Articles.	From	To	Per	Rate in dollars and cents.
78	Ore, Iron, C. L. min. wt. see item (11)	Cartersville, Ga.	Chattanooga, Tenn.	Ton 2240 lbs.	40

172*i* *Extracts from Nashville, Chattanooga & St. Louis Railway Local Freight Tariff I. C. C. No. 1678-A, Filed on February 27, 1909, Effective April 2, 1909, and as Amended Still in Force on February 11, 1913.*

Title Page.

Local Freight Tariff of the Nashville, Chattanooga & St. Louis Railway, Lessee of Western & Atlantic R. R. Co.

Local Freight Tariff No. 5.

Page 7.

Rules Governing Tariff.

Minimum Carload weight on specific commodities when reference is made to this item.

Item No. 11.

Minimum weight per car to be charged on commodities bearing reference to this item is the stenciled capacity of the equipment (except as noted). Where freight is weighed enroute or at terminal points in the absence of weighing facilities at point of origin, rendering necessary approximate loading not less than 90 per cent of the stenciled capacity may be loaded in car, in excess of 110 per cent of the car's stenciled capacity will be charged double the tariff rate. Except that where the Transportation Department furnished cars, the sides of which will not permit the loading of as much as the stenciled weight, actual weight will be charged when such cars are loaded to visible capacity.

Page 20.

Miscellaneous Commodity Rates—Continued.

Item No.	Articles.	From	To	Per	Rate in dollars and cents.
78	Ore, Iron, C. L. Min. wt. see item (11)	Cartersville, Ga.	Chatt. Tenn.	Ton 2240 lbs.	40

172*j* *Extracts from Nashville, Chattanooga & St. Louis Railway Supplement No. 18 to Local Freight Tariff No. 6, I. C. C. No. 1678-A, Filed on April 12, 1911, and in Force Throughout Period May 16, 1911, to August 7, 1911, Both Inclusive.*

Page 4.

Article.	From	To	Per	Rate in cents.
Ore, Iron, C. L. Minimum Weight, see item 11.	Cartersville, Ga.	Chattanooga, Tenn.	Ton 2240 lbs.	40

NOTE.—Rate named does not include any switching charge.

172*k* *Extracts from Nashville, Chattanooga & St. Louis Railway Supplement No. 19 to Local Freight Tariff No. 6, I. C. C. No. 1678-A, Filed on July 5, 1911, and in Force Throughout Period August 8, 1911, to August 25, 1911, Both Inclusive.*

Page 4.

Article.	From	To	Per	Rate in cents.
Ore, Iron, C. L. Minimum weight, see item 11.	Cartersville, Ga.	Chattanooga, Tenn.	Ton 2240 lbs.	40

NOTE.—Rate named does not include any switching charge.

172*l* *Extracts from Nashville, Chattanooga & St. Louis Railway Supplement No. 21 to Local Freight Tariff No. 6, I. C. C. No. 1678-A, Filed on July 22, 1911, and Still in Force on February 11, 1913.*

Page 5.

Article.	From	To	Per	Rate in cents.
Ore, Iron, C. L. minimum weight, see item 11A.	Cartersville, Ga.	Chattanooga, Tenn.	Ton 2240 lbs.	40

NOTE.—Rate named does not include any switching charge.

Page 2.

Item No. 11-A Cancels Item No. 11.

Minimum Carload weight on specific commodities when reference is made to this item.

C. L. minimum weight will be the stenciled capacity of car—except that in the absence of weighing facilities at shipping point, if freight is weighed in transit or at destination, C. L. minimum weight will be 90 per cent of stenciled capacity of car.

No car may be loaded in excess of 110 per cent of its stenciled capacity. If overloaded, the excess (of 110 per cent of car's stenciled capacity) must be discharged, or if transported to destination because of no weighing facilities at shipping point or enroute, double carload tariff rate will be applied on such excess.

NOTE.—On freight loaded in cars which will not laod to the stenciled weight capacity actual weight will apply when such cars are loaded to visible capacity.

173 *Certified Copy of Ruling of Interstate Commerce Commission, Filed May 10th, 1913.*

173*a* Interstate Commerce Commission.

Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached contain a true and correct copy of Ruling of the said Interstate Commerce Commission, subject "Responsibilities of Carriers under Tariffs," published in Special Circular No. 5 (Tariff Department) and issued by the said Interstate Commerce Commission on November 15, 1907.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 23rd day of September, A. D., 1912.

[SEAL.] JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

173*b* *Responsibilities of Carriers under Tariffs.*

Prior to May 1, 1907, the date upon which the Commission's freight tariff rules became effective, no uniform or definite practice or rule was followed by carriers in regard to concurrence in joint tariffs. The plan most generally followed was for each carrier to file with the Commission a statement that it thereby concurred in any tariff, issued by any carrier, and in which it was shown as a participant, except when it gave to the Commission specific notice of nonconcurrence in particular issues. Some carriers, however, did not file su-*e* a declaration, but accepted traffic and settlements under joint tariffs in which they were shown as participants, although no concurrence therein had ever been given.

The general, if not universal, understanding and practice was that every carrier had a right to issue tariffs containing joint through rates over the lines of other carriers named therein as participants, to note therein that the carriers named as participants would certify their concurrence to the Interstate Commerce Commission, and for all to use such tariffs except in cases where carriers specifically certified to the Commission their nonconcurrence in certain publications.

To now undertake to chec*l* out and follow down definite and actual concurrence of carriers in tariffs issues prior to May 1, 1907, would be a hopeless task; and to declare unlawful all tariffs, and participation therein, which were not so definitely and actually concurred in, other than by use thereof, would be to overthrow practically all such joint tariffs and leave transportation in chaos.

Some carriers are now seeking to evade liabilities under such joint tariffs on the plea that they never concurred therein; although in each instance so far brought to notice such carrier is shown to have accepted traffic and collected charges thereon in accordance with such

tariff up to, and in some instances subsequent to date of filing notice of concurrence.

Such complications are impossible as to tariffs issued subsequent to May 1, 1907, if the Commission's tariff regulations are observed. The Commission cannot undertake to now excuse carriers from responsibilities placed upon them by tariffs that were issued prior to May 1, 1907, and in which they are named as participants in conformity with customs that were followed so generally and for so long at time as to render them binding upon those who did not give notice of nonconcurrence, except in accordance with and subsequent to filing of specific notices of nonconcurrence.

The Commission's tariff regulations now require that the carrier or joint agent that issues a joint tariff shall, before issuing same, have secured the definite and affirmative concurrence of every carrier shown therein as a participant, and shall show in connection with the name of each participating carrier the form and number of the instrument by authority of which that carrier is made a party to the tariff.

173c A carrier has no means of preventing another carrier from naming it as party to a joint tariff without proper authority so to do. It cannot, however, be bound by such unauthorized act, and it is its obvious duty to refuse to recognize or apply any such unlawful issue. It should also at once call attention of the Commission and of the one that issued the tariff to such erroneous action.

If one or more carriers are, without proper authority, so shown as participating in any *at*riff and other carriers are lawfully shown as parties thereto, the use of the publication is unlawful as to the carriers that are named as parties thereto without proper authority and lawful as to those that are parties to it under proper authority. The carrier over whose line shipments of passengers are sent under a joint tariff is bound by the terms of that tariff if it has lawfully concurred therein, and, if it has not lawfully concurred therein, may not accept earnings in accordance therewith, but must demand for the service performed its lawful earnings according to its lawful tariffs.

Responsibility for the unlawful incorporation of any carrier in a tariff will rest upon the carrier that issued the tariff, or, if the tariff is issued by a joint agent and attorney for two or more carriers, will rest upon that one of his principals that accepts and forwards the business under that tariff.

In passing upon any complaint of overcharge growing out of improper or unlawful inclusion of any carrier's name in the list of participating carriers in the tariff under which the business was accepted and forwarded the commission will apply the principles above stated.

174 *Certified Copy Schedule of Rates Interstate Commerce Commission, Filed May 10th, 1913.*

174*a* Interstate Commerce Commission,
Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached contain true and correct extracts from the schedules therein more particularly described, said schedules having been filed with the said Interstate Commerce Commission on dates specified in said papers.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 11th day of February, A. D. 1913.

[SEAL.] JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

174*b* *Extracts from Cincinnati, New Orleans & Texas Pacific Railway Company Tariff I. C. C. No. 3269, Filed on February 1, 1907.*

Title Page.

Cincinnati, New Orleans & Texas Pacific Railway Company in Connection with Western & Atlantic R. R.

Rates of Freight to C. N. O. & T. P. Ry. Stations viz: Dayton, Tenn., on Raw Material (for Use of Pig Iron Furnaces, only).

(Reissue.)

Effective January 26, 1907.

Page 4.

YYY Commodity.	From	Rate.
Ore, Iron C. L. minimum weight, marked capacity of car.	Cartersville, Ga.	Per ton 2240 pounds. W. & A. R. R....40 C.N.O.& T.P. ...20
6		Total .....60¢

Applies from C. N. O. & T. P. Ry. Tracks at Chattanooga, Tenn...

174c *Extracts from Supplement No. 2 to Cincinnati, New Orleans & Texas Pacific Railway Company Tariff I. C. C. No. 3269, Filed on January 27, 1909.*

Cincinnati, New Orleans & Texas Pacific Railway Co. in Connection with Nashville, Chattanooga & St. Louis Ry.

Rate on Iron Ore, C. L., from Cartersville, Ga., Named on Page 4 of R-196, I. C. C. 3269, January 27, 1907, Is Cancelled.

For rate see N., C. & St. L. Ry. Iron Ore Tariff No. 18, I. C. C. 1644-A, December 21, 1908, or subsequent issues.

Filed (on back): No. 12597. Certified copy of schedule of rates of Interstate Commerce Commission. Dayton Coal & Iron Co. vs. C. N. O. & T. P. Ry. Co. et al. Filed May 10, 1913. C. & M.

175 *Agreement of Attorneys. Filed June 2nd, 1913.*

In this cause it was agreed in the trial of the case that any of the parties might read such portions of regulations or rulings of the Interstate Commerce Commission contained in a pamphlet and known as "Interstate Commerce Rulings No. —", which pamphlet has been filed in the cause as desired, all of which was done, and it is further agreed that either party may have such portions of this phamphlet copied in the record if the cause should be appealed.

BROWN, SPURLOCK & BROWN,
W. B. MILLER, *For Compl't.*

O. K.

Affidavit of John V. Bryant (Treated as Deposition). Filed June 6th, 1913.

STATE OF OHIO,
Hamilton County, ss:

John V. Bryant, being first duly sworn, makes oath and says that he is chief clerk in the office of the comprtoller of The Cincinnati, New Orleans & Texas Pacific Railway Company, and that he is the same John V. Bryant whose deposition was heretofore taken in the above entitled cause; that the tabular statement hereto attached, marked Exhibit A, and made part hereof is a statement of the amounts due from the Dayton Coal & Iron Company to the Cincinnati, New Orleans & Texas Pacific Railway Company and the payments and the deductions in settlements involved in the suit now pending in the District Court of the United State for the Southern District of Ohio brought by the Cincinnati, New Orleans & Texas Pacific Railway Company against the Dayton Coal & Iron Company, and in the above entitled cause; that the tabular statement shows:

In the first column the dates on which accounts were rendered by

the Cincinnati, New Orleans & Texas Pacific Railway Company to the Dayton Coal & Iron Company.

In the second column, the correct amounts as claimed by the Cincinnati, New Orleans & Texas Pacific Railway Company to be due on said dates from the Dayton Coal & Iron Company on the basis of 70¢ rate from Cartersville, Ga., and Emerson,
176 Ga., to Dayton, Tennessee.

In the third column, the amount paid by the Dayton Coal & Iron Company, which amount was paid by note dated as shown in the fourth column for the amount shown in the fifth column, which amount included amount of payment with interest thereon to date of maturity as shown in the sixth column.

The seventh column shows the total amount deducted by the Dayton Coal & Iron Company.

The eighth column shows the Freight Claim Agent's claim number.

The ninth column shows the date of receipt held by the Cincinnati, New Orleans & Texas Pacific Railway Company from the Dayton Coal & Iron Company when such receipt was given.

The tenth column shows the amount deducted from such settlement on account of the difference between the 60¢ rate and the 70¢ rate.

The eleventh column, being the column headed "Exhibit A", is the correct amount, as corrected by reference to tariffs, including extra charges for overloading cars, and the like, due from the Dayton Coal & Iron Company to the Cincinnati, New Orleans & Texas Pacific Railway Company on account of said difference between the 60¢ and 70¢ rate.

The twelfth column, being the column headed "Exhibit C", shows the amount of certain charges for demurrage due by the Dayton Coal & Iron Company to the Cincinnati, New Orleans & Texas Pacific Railway Company, which charges for demurrage are embraced in the third cause of action in the petition in said suit pending in the District Court of the United States for the Southern District of Ohio hereinbefore referred to.

The thirteenth column shows the file number of the Freight Claim Agent with respect to the charges embraced in the column headed "Exhibit B", hereinafter referred to.

The fourteenth column shows the date of receipts given by the Dayton Coal & Iron Company to the Cincinnati, New Orleans & Texas Pacific Railway Company for the deductions referred to in said exhibit B.

The fifteenth column is the amount deducted by the Day-
177 ton Coal & Iron Company from settlements, on account of claims of overcharge and the like from miscellaneous shipments other than iron ore from Cartersville and Emerson, Georgia.

The sixteenth column shows the amounts which were improperly deducted by the Dayton Coal & Iron Company on account of such claims on miscellaneous shipments.

Affiant says that with reference to each claim embraced in these several columns he is in possession of statements rendered by the

Dayton Coal & Iron Company showing amounts of deductions as made by that company, except the settlement dated April 30, 1907, in which case the amount deducted by the Dayton Coal & Iron Company on account of the difference between the 60¢ rate and 70¢ rate was $245.42. The correct amount due the Cincinnati, New Orleans & Texas Pacific Railway Company is $263.21. In that case he is in possession of a copy of the statement rendered by the Dayton Coal & Iron Company which was furnished to him on request by the agent of the Cincinnati, New Orleans & Texas Pacific Railway Company at Dayton, Tennessee, and which he believes to be a correct copy.

Affiant further says that when his deposition was taken in the above entitled cause he was not asked as to the correctness of this account but was only asked to produce the receipts in his possession from the Dayton Coal & Iron Company, and that he did so produce the same, and that the correct amount due from the Dayton Coal & Iron Company to the Cincinnati, New Orleans & Texas Pacific Railway Company, as shown by the statements rendered by that company as hereinbefore stated and as corrected by proper reference to the tariffs on file, is, for deductions made by the Dayton Coal & Iron Company on account of difference between the published tariff rate of 70¢ from Cartersville and Emerson, Ga., to Dayton, Tennessee, and the rate claimed by the Dayton Coal & Iron Company 60¢, $4,739.49 with interest from the dates of the deduction of the same as shown in the statement Exhibit A, and further the amount of $140. on account of demurrage charges with interest from the dates of the deduction of the same as shown in said exhibit, and further the amount of $153.79 with interest from the date of the deduction of the same as shown
178 in said exhibit A.

And further affiant sayeth not.

JOHN V. BRYANT.

Sworn to before me and subscribed in my presence this 14th day of April, 1913.

[SEAL.] EUGENE BRUSHMAN,
Notary Public, Hamilton County, Ohio.

It is agreed that above affidavit be treated as Deposition of J. V. Bryant subject to exception for competency and relevancy and except as to itsm- of $140.00 & $153.79, demurrage and miscellaneous, account.

G. H. WEST.
BROWN, SPURLOCK & BROWN.

179 *Extracts from Tariff Circular No. 18-A.*

The term "joint rate" as used herein, is construed to mean a rate that extends over the lines of two or more carriers and that is made by agreement between such carriers.

"Joint tariffs" are those which contain or are made up from such "joint rates".

180 *Extracts from Tariff Circular No. 18-A.*

"Joint tariffs" are those which contain or are made up from such "joint rates". (Page 3.)

If no specific rate from point of origin to destination of a through shipment is provided, and no specific manner of constructing combination rate for it is prescribed, the lowest combination of rates applicable via the route over which the shipment moves is the lawful rate for that shipment.

Such combination through rate must be treated as a unit from the date of original shipment to the date of its arrival at destination, and the rate applied must be the combination of the rates which exists upon the date of original shipment. All of the conditions regulations, and privileges obtaining as to any factor in such combination rate for through shipment at the time of original shipment upon such combination through rate must be adhered to and cannot be varied as to that shipment during the period of transportation of such shipment to its final destination. A local or proportional rate "in" cannot be absorbed, diminished, or affected by any "out" rate not in effect at the time when the traffic moved upon such local or proportional rate.

(Clause C, page 12.)

A concurrence does not confer authority upon either carrier or agent to cancel tariffs of concurring carrier, and therefore, tariffs issued under concurrences may not assume to cancel, or carry notation of cancellation of, tariffs of and issued by concurring carriers. Such cancellations must be made by the carrier that issued the tariff that is to be canceled.

(Clause C, page 59.)

Rule 68 in Tariff Circular 18-A.

Responsibilities of Carriers under Tariffs (issued November 15, 1907).—(*a*) Prior to May 1, 1907, the date upon which the Commission's freight tariff rules became effective, no uniform or definite practice or rule was followed by carriers in regard to concurrence in joint tariffs. The plan most generally followed was for each carrier to file with the Commission a statement that it thereby concurred in any tariff, issued by any carrier and in which it
181 was shown as a participant, except when it gave to the Commission specific notice of non-concurrence in particular issues. Some carries, however, did not file such a declaration, but accepted traffic and settlements under joint tariffs in which they were shown as participants, although no concurrence therein had ever been given.

The general, if not universal, understanding and practice was that every carrier had a right to issue tariffs containing joint through rates or fares over the lines of other carriers named therein as par-

ticipants, to note therein that the carriers named as participants would certify their concurrence to the Interstate Commerce Commission, and for all to use such tariffs except in cases where carriers specifically certified to the Commission their non-concurrence in certain publications.

To now undertake to check out and follow down definite and actual concurrence *or* carriers in tariffs issued prior to May 1, 1907, would be a hopeless task; and to declare unlawful all tariffs, and participation therein, which were not so definitely and actually concurred in, other than by use thereof, would be to overthrow practically all such joint tariffs and leave transportation in chaos.

Some carriers have sought to evade liabilities under such joint tariffs on the plea that they never concurred therein, although in each instance so far brought to notice such carrier is shown to have accepted traffic and collected charges ther-on in accordance with such tariff up to, and in some instances subsequent to, date of filing notice of nonconcurrence.

(Fine print in margin. Old system of concurrences which was almost universally followed and which was universally accepted and recognized by carriers.)

(*b*) *D*uch complications are impossible as to tariffs issued subsequent to May 1, 1907, if the Commission's tariff regulations are observed. The commission cannot undertake to now excuse carriers from responsibilities placed upon them by tariffs that were issued prior to May 1, 1907, and in which they are named as participants in conformity with customs that were followed so generally and for so long a time as to render them binding upon those
182 who did not give not*u*ce of nonconcurrence, except in accordance with and subsequent to filing of specific notices of nonconcurrence.

The Commission's tariff regulations require that the carrier or joining agent that issues a joining tariff shall, before issuing same, have secured the definite and affirmative concurrence of every carrier shown therein as a participant, and shall show in connection with the name of each participating carrier the form and number of the instrument by authority of which that carrier is made a party to the tariff.

(Fine print in margin. Under tariffs filed prior to May 1, 1907, carriers are responsible, in accord with custom then generally followed, except when and after they filed specific notice of non'currence in certain issues.)

(*c*) A carrier has no means of preventing another carrier from naming it as party to a joint tariff without proper authority so to do. It cannot, however, be bound by such unauthorized act and it is its obvious duty to refuse to recognize or apply any such unlawful issue. It should also at once call attention of the Commission and of the one that issued the tariff to such erroneous action.

(Fine print in margin. Carrier not bound by being named as participant in tariff without its authority.)

(*d*) If one or more carriers are, without proper authority, so

shown as participating in any tariff and other carriers are lawfully shown as parties thereto the use of the publication is unlawful as to the carriers that are named as parties thereto without proper authority and lawful as to those that are parties to it under proper authority. The carrier over whose line shipments or passengers are sent under a joint tariff is bound by the terms of that tariff if it has lawfully concurred therein, and if it has not lawfully concurred therein, many not accept earnings in accordance therewith, but must demand for the service performed its lawful earnings according to its lawful tariffs.

(Fine print in margin. Tariff lawful as to carriers shown as participants under lawful authorizations and unlawful as to
183 carriers named as participants without lawful authorities.)

(*2*) Responsibility for the unlawful incorporation of any carrier in a tariff will rest upon the carrier that issued the tariff, or, if the tariff is iss-ed by a joint agent and attorney for two or more carriers, will rest upon that one of his principles that accepts and forwards the business under that tariff.

(Fine print in margin. Responsibility for unlawful incorporation of a carrier in a tariff.)

(*f*) In passing upon a complaint of overcharge growing out of improper or unlawful inclusion of any carrier's name in the list of participating carriers in the tariff under which the business was accepted and forwarded the Commission will apply the principles above stated.

(Fine print in margin. Policy of Commission on complaints.)

(*g*) By its Special Order No. 3 of March 2, 1909, the Commission required that all freight tariffs which were on file prior to May 1, 1907 and as to which specific participation and concurrences were not shown as required by the Commission's tariff regulations, should, on or before June 1, 1909, be canceled or be supplemented so as to show specific participation and lawful concurrence of every carrier that uses or participates in such tariff subsequently to June 1, 1909. It declared that the use of such tariffs as to which the terms of the Special Order had not been complied with on or before June 1, 1909, would after June 1, 1909, be unlawful and that prosecution will follow such use.

The Commission's ruling of June 14, 1909, adding to above ruling the following, is hereby rescinded:

If, however, such a tariff not having been canceled is hereafter supplemented on statutory notice to show the list of participating carriers and their lawful concurrences therein, such tariff may, subsequent to the lawfully effective date of such supplement, be lawfully used by the carriers so shown as participating and concurring therein.

(Fine print in margin. Status on and after June 1, 1909, of freight tariffs filed prior to May 1, 1907.)

184 (Second paragraph on page 3.)

Tariffs that were lawfully on file with the Commission on May 1, 1907, and that have not since that time been superseded or canceled, will, except as provided in paragraph (*g*) Rule 68 be consid-

ered as continued in force until they can be properly reissued. All tariffs filed on or after May 1, 1911, must, except as otherwise specified herein, conform to all of these rules. The Commission may direct the reissue of any tariff at any time.

Final Decree Enrolled June 2nd, 1913.

No. 12597.

THE DAYTON COAL & IRON COMPANY, LIMITED,
vs.
C., N. O. & T. P. RAILWAY COMPANY et al.

Be it remembered this cause came on to be heard on the entire record and agreement of counsel, from all of which the court is of opinion and decrees:

185 (1) That the rate of 70 cents per ton on iron ore promulgated and contended for by the defendants to the original bill was and is illegal, inequitable and unenforcible, as against complainant and that complainant was entitled to the 60 ct. rate as contended for by it herein.

(2) That the defendant Cincinnati, New Orleans & Texas Pacific R'y Company be perpetually enjoined from prosecuting suit No. 6720 styled The Cincinnati, New Orleans & Texas Pacific Railway Co. vs. The Dayton Coal & Iron Co. in U. S. Circuit (District) court for the southern District, Western Division of Ohio, insofar as said suit seeks to recover against present complainant on all items, except deductions made by complainant of $140.00 and demurrage and miscellaneous account $153.79 making a total of $293.79 as to which no decree is passed for the reason that the parties by consent at bar eliminated said two items from this controversey.

Barring said two last items above, the plaintiff in said suit No. 6720 in U. S. District Court, Southern District of Ohio, Western Division, is enjoined perpetually from prosecuting the controversey presented therein; and as to said two items of $140. and $153.79 the court makes no order and passes no decree for the reasons above. And neither of the parties will, in future, as to said two items, be in any waise prejudiced, in any controversy now existing or that may hereafter be brought by reason of this decree.

(3) That under its cross complaint herein the Cincinnati, New Orleans & Texas Pacific Railway Co. have and recover of the Nashville, Chattanooga & St. Louis Railway the sum of $4739.49 being the excess above the 60 cts. rate, or difference of 10 ct. per ton, which said latter carrier demanded and received from the former on ores shipped by complainant from Cartersville and other Southern points to Dayton, Tennessee, such demand and payment being under color and by reason of the $.70 rate aforesaid, for which execution is awarded.

(4) That defendant Nashville, Chattanooga & St. Louis Railway Co. pay all the costs of this cause, for which execution is awarded.

186 It was further agreed that either party might read in this court, or in the Appellate Court, if this cause should be reviewed in a higher court, any decisions of the Interstate Commerce Commission, published in the I. C. C. Reports, without having same certified, but to have like force and effect as if legally certified.

All the matters above, so authorized to be read by agreement, are to be read subject to exceptions for competency and relevancy. From all of which decree the Nashville, Chattanooga and St. Louis Railway excepts and prays an appeal to the next term of the Supreme Court at Knoxville, Tennessee, which is granted upon appellant executing proper appeal bond, which is done.

As to all of that part of said decree granting complainant relief and denying the Cincinnati, New Orleans & Texas Pacific Railway Co. a recovery under its cross bill against the Dayton Coal & Iron Co. and also as to the action of the Court, in failing to give the said Cincinnati, New Orleans & Texas Pacific R'y Co. a judgment against the Nashville, Chattanooga & St. Louis R'y Co. for interest on the recovery granted herein, the said Cincinnati, New Orleans & Texas Pacific Railway Co. excepts and prays an appeal to the next term of the Supreme Court, at Knoxville, which is granted upon said appellant executing proper appeal bond as required by law, which is done.

Appeal Bond. Filed 3rd Day of June, 1913.

Know all men by these presents, That we, Cincinnati, New Orleans & Texas Pacific Railway Co. Principal and M. M. Allison and J. J. Lynch, sureties are held and family bound unto Dayton Coal & Iron Co. and Nashville, Chattanooga & St. Louis Railway Co. in the sum of Two hundred & Fifty ($250.00) dollars to the payment of which well and truly to be made and done, we bind ourselves jointly and severally, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated the 2 day of June, One Thousand Nine Hundred and Thirteen.

The condition of the above obligation is such, That, whereas, in the above stated cause the said principal obligaor has praved
187 an appeal from a decree of said Court, rendered at the June term thereof 1913, to the next term of the Supreme Court to be held at Knoxville, Tennessee, on the second Monday of September next, which to it was granted on bond, with security being given thereon as required by law, in the sum of $250.00 and said principal obligor desiring to perfect said appeal execute- this bond.

Now should the said principal obligor well and truly and with effect prosecute said appeal, and abide by and perform all orders and decrees of said Supreme Court in relation thereto in the premises then the above obligation to be void, otherwise to be and remain in full force and virtue.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., [SEAL.]
By J. J. LYNCH, *Atty.* [SEAL.]
M. M. ALLISON. [SEAL.]
J. J. LUNCH. [SEAL.]

Appeal Bond. Filed 2nd Day of June, 1913.

Know all men by these presents, That we, Nashville, Chattanooga & St. Louis R'y, Foster V. Brown, Frank Spurlock & Joseph E. Brown are held and firmly bound unto the Dayton Coal & Iron Co., Limited and the Cincinnati, New Orleans & Texas Pacific R'y in the sum of Five Thousand & Five Hundred Dollars, to the payment of which well and truly to be made and done, we bind ourselves jointly and severally, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated the 2 day of June, One Thousand, Nine Hundred and thirteen.

The condition of the above obligation is such, That whereas, in the above stated cause the said principal obligor has praved an appeal from a decree of said Court, rendered at the June Term thereof, 1913, to the next term of the Supreme Court to be held at Knoxville, Tennessee, on the second Monday of September next, which to it was granted and said principal obligor desiring to perfect said appeal execute- this bond.

Now should the said principal obligor well and truly and with effect prosecute said appeal, and abide by and perform all
188 orders and decrees of said Supreme Court in relation thereto in the premises then the above obligation to be void, otherwise to be and remain in full force and virtue.

NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY. [SEAL.]
FOSTER V. BROWN, [SEAL.]
FRANK SPURLOCK. [SEAL.]
JOSEPH E. BROWN. [SEAL.]

Designation of Transcript of Complainant. Filed June 27th, 1913.

Law Office of W. B. Miller,
Chattanooga, Tennessee.
Trial and Corporation Practice.

W. B. Miller.
George H. West.
Burkett Miller.
T. H. Wagner.

June 24, 1913.

Mr. Sam Erwin, C. & M., City.

D. C. & I. Co. vs. C., N. O. & T. P. R'y Co. et al.

DEAR SIR: Pursuant to your request, on behalf complainant I designate the following portions of the record to be copied in the transcript:

(1) All pleadings, consisting of original and amended bills, answers of all defendants thereto, cross-bill C. N. O. & T. P. and answers thereto.

(2) Deposition Robt. Thomson and exhibits thereto: I suggest the original exhibts be sent up, and hereby consent that they may—

certainly this should be true as to the railroad tariffs attached and I can see no reason why all the other original exhibits might not be included.

(3) Deposition S. H. Whitaker.

(4) All certified copies from the Interstate Commerce Committee, filed by either party to the litigation.

(5) Testimony of witnesses for C. N. O. & T. P. R'y taken at Cincinnati, with exhibits thereto—and I suggest that the original exhibits be used and hereby consent accordingly, especially the tariff sheets.

189 (6) Extracts from Tariff Circular No. 18-A referred to in the final decree as follows:

(*a*) Definitions of joint rate and joint tariffs, appearing page 3.

(*b*) Clause (*c*) at bottom of page 12.

(*c*) defining a concurrence, page 59.

Yours very sincerely,

W. B. MILLER,
Solicitor for Complainant.

Designation of Transcript by Defendants. Filed June 28th, 1913.

Form 533.
Nashville, Chattanooga & St. Louis Railway,
Western & Atlantic Railroad,
Legal Department,
Brown, Spurlock & Brown, Attorneys.

CHATTANOOGA, TENN., June 25, 1913.

Mr. Sam Erwin, Clerk & Master, City.

Dayton Coal & Iron Co. vs. C., N. O. & T. P. R'y et al.

DEAR SIR: In addition to the portions of the record designated to be copied on behalf of the complainant in the above case, we desire to designate the following portions of the record which we will thank you also to copy in the transcript.

1. Deposition of C. Gribble and agreement of counsel which immediately follows this deposition.

2. Deposition of H. L. Haynes and exhibits thereto.

3. Deposition of D. M. Stanfield.

4. Extracts from tariff circular 18-A referred to in final decree as follows: rule 68 contained in said tariff circular 18-*a* appearing on page 100 from and including clauses A, B, C, D, E, F, G, and down to rule 69.

Immediately following rule 68, please copy also the second paragraph on page 3 of said circular 18-A beginning with the words, "Tariffs that are lawfully on file", etc.

190 5. Affidavit of John V. Bryant.

Yours very truly,

PRITCHARD, ALLISON & LYNCH,
Attys. for C. N. O. & T. P. R'y.
BROWN, SPURLOCK & BROWN,
Attys. for N. C. & St. L. R'y.

191 *Rule Docket.*

No.	Solicitors.	Parties.
12,597.	Burkett, Miller & Moore, Brown, Spurlock & Brown, Pritchard & Sizer, and Chambliss & Chambliss.	The Dayton Coal & Iron Co. Ltd., a Corporation Doing Business in Tennessee, with an Office, Agency and Place of Business at Dayton, Rhea County, Tennessee, vs. Cincinnati, New Orleans & Texas Pacific Rwy. Co., Nashville, Chattanooga & St. Louis Rwy. & Western & Atlantic R. R. Co., all Corporations having Offices, Agents and Places of Business in Hamilton County, Tenn., and all doing Business in the State of Tennessee.

1911

May 10	Original bill filed.
" 10	Prosecution bond, Miller & Swafford, sureties.
" 10	Injunction $2,000, W. B. Miller, surety.
" 10	Injunction issued as prayed and retd.' 5/10 served by J. A. McGill, D. S.
" 10	Copy of bill 5,000 W. & Spa. to ans. issued and ret'd. 5/10 served by J. A. McGill, D. S.
June 10	Demurrer of N. C. & St. L. Ry. & W. & A. Ry Co. filed notice.
" 10	Notice of motion to dissolve injunction with service ack'd by W. B. Miller, filed.
" 10	Motion W. B. Miller to withdraw papers.
" 10	1911, Order continuing cause to the June Spl. Term C. R. 63.
Aug. 22	Motion of S. R. Roddy to withdraw papers (Chambliss & Chambliss).
" 29	Motion of W. B. Miller to withdraw papers filed and retd. /26.
" 31	Agreement to act on demurrer filed.
Sept. 26	Decree allowing complainant to amend bill as of June 15, 1911, dissolving injunction heretofore granted; overruling demurrer of defendants; 20 days to answer from Sept. 26, 1911 C. R. 76.
Sept. 26	Amendment to original bill filed as of June 15, 1911.
Oct. 14	Motion for additional time to file answer filed.
" 25	Answer of C., N. O. & T. P. R-ilway Co. filed. Notice given.

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Oct.	28	Answer of N. C. & St. L. Ry. and W. & A. Railroad Co. filed. Notice Given.
"	30	Motion of W. B. Miller to withdraw papers filed and retd. 1/30.

1912 Feb. Term.

Feb.	15	Continued by consent 2 C 563.
Mar.	29	Motion of W. B. Miller to withdraw papers, filed.
Ap'l	10	Deposition of Robert Thompson filed. Notice given (2)

1912 April Term.

Ap'l	18	Continued by consent 2 C 679.
May	20	Interrogatories for H. H. Taylor filed 2 notices.
"	20	Interrogatories for S. H. Whitaker, Filed 2 notices.

1912 July Special.

July	23	Continued by consent 2 D 138.
Spet.	5	Deposition of Frederick D. Claggett & John V. Bryant rec'd from P. O. Opened and filed. 3 notices.
"	20	Deposition of S. H. Whitaker rec'd from P. O. Opened, filed & notice given (3).
Nov.	27	Motion of J. J. Lynch to withdraw papers except depo. Claggett retd. Filed.

1912 Dec. Term.

Dec.	19	Continued by consent, 2 D 324.
Feb.	19	Motion for leave to file cross bill filed. 2 notices.
"	20	Deposition of C. Gribble and H. L. Haynes filed.
"	24	Cross bill of C. N. O. & T. P. Ry. Co. vs. Dayton Coal & Iron Co. Ltd. & N. C. & St. L. Ry. Filed.
"	25	Order allowing cross bill filed D 543.
"	"	Answer of Dayton Coal & Iron Co. Ltd. to cross bill filed (N).
Ap'l	3	Motion Joe Benn to withdraw papers.
May	10	Answer of N. C. & St. L. Ry. to cross bill of C. N. O. & T. P. Ry. Co. filed. Notice given.
"	10	Deposition of D. M. Stanfield, taken and filed.
"	10	Certified copy schedule rates Interstate Commerce Commission filed.
"	10	Certified copy schedule rates Interstate Commerce Commission filed.
"	10	Certified copy schedule rates Interstate Commerce Commission filed.
"	10	Certified copy schedule rates Interstate Commerce Commission filed.
"	10	Certified copy Ruling Interstate Commerce Com. filed.

193

"	10	Certified copy Concurrence freight rate Interstate Commerce Com. filed.

" 10 Certified copy schedule rates Interstate Commerce Com. filed.
June 2 Agreement of att'ys filed.
" 2 Affidavit of John V. Bryant filed.

1913 June Term.

June 2 Final decree &c. judgt. for costs against N. C. & St. L. Ry. Co. praying appeal 2 E 90.
" 2 Appeal bond of N. C. & St. L. Ry. Co. $5,500.00 Foster V. Brown.
" 2 Frank Spurlock, & Joseph E. Brown, sureties, taken and filed.
" 27 Appeal Bond of C. N. O. & T. P. Ry. Co. $250.00 M. M. Allison & J. J. Lynch, sureties, taken and filed.
" 27 Designation of transcript for complt. filed.
" " " " defts. filed.

194 *Execution Docket.*

Parties.

No.	Solicitors.	Parties.
12597.	Burkett, Miller & Moore, Brown, Spurlock & Brown, Pritchard & Sizer and Chambliss & Chambliss.	DAYTON COAL & IRON CO., LTD., vs. C. N. O. & T. P. RY. CO. et al.

1911.
May 10.

State tax 2.50
County tax 2.50
25 25 25 25 50
Filing Bill Aff. Bond Recdg. Inj. bond 1.50
25 1.00 5.00 25 75 25
Record Injunct. copy bill cert. spa. demurrer 7.50
25 25 10 25 20 25
Notice not. motion Order mot. agreement ... 1.30
50 25 25 25
Decree amend. motion motion 1.25
25 25 25 25 10 25 10
Ans. not. ans. not. motion order motion .. 1.45
25 50 25 25 50 25 50
Depo. 2 not. order int. 2 not. int. 2 not.. 2.50
25 50 50 25 50 10
Order 2 depo. 2 not. depo. 2 not. motion .. 2.10
25 25 50 2.00 25 25
Ord. mot. 2 not. 2 depo. X bill affi. 3.50
25 25 25 25 50 10 25
Bond recdg. ans. affi. 2 not. mot. ans. 1.85
50 1.00 1.75 25 75
2 not. depo. 7 cert. agree. final decree 4.25
2.70 50
Docket bill cost 3.20

31.90

	1.00	3.00		
J. A. McGill, D. S. Serving	1 inj.	3 deft's	.....	4.00
Robert Thompson witness	1 day		.....	1.00
Frederick D. Claggett, witness	1 day		.....	1.00
Jno. V. Bryant	" 1 "		.....	1.00
S. H. Whitaker	" 1 "		.....	1.00
C. Gribble	" 1 "		.....	1.00
H. L. Haynes	" 1 "		.....	1.00
D. M. Stanfield	" 1 "		.....	1.00
C. N. O. & T. P. Ry. Co. Amt. pd.	2	depositions	.....	2.00
Dayton Coal & Iron Co.	" " 2	"	.....	2.00
				51.90

195 June 2, 1913.

Judgment against N. C. & St. L. Ry. Co. $4,739.49 and costs. Granting appeal.

Costs Incident to Appeal.

25	1.00	50	50		
Order appeal	2 bonds	rec'd'g 2 bonds	2 designat.	....	2.25
80.00		50	50		
Transcript 80,000 w.		seal	express	.....	81.00
					$83.25

196 *Certificate of Clerk & Master.*

STATE OF TENNESSEE,
County of Hamilton, ss:

I, Sam Erwin, Clerk & Master of the Chancery Court of said county, hereby certify that the foregoing one hundred and ninety six pages of words and figures comprise a full, true and perfect transcript, as required by the rules of the Supreme Court, of all the records, pleadings, exhibits, proof and proceedings had by said court in the cause wherein The Dayton Coal & Iron Co. Ltd. are the complainants and the C. N. O. & T. P. Railway Co. et als. are the defendants, as the same remains of record and on file in my office.

Witness my hand and the Seal of said Court at office in the city of Chattanooga, Tennessee this 18th day of August, 1913.

(Signed) SAM ERWIN,
Clerk & Master.
By P. E. McMILLAN,
Dept. Clerk & Master.

No. 1.

197 Filed November 29, 1913.

S. E. CLEAGE, *Clerk,*
By JAS. T. JOY, *D. C.*

Knoxville, September Term, 1913.

THE DAYTON COAL & IRON CO., LIMITED,
vs.
C., N. O. & T. P. RAILWAY COMPANY and N., C. & ST. L. RAILWAY COMPANY.

Opinion.

If we could reach the conclusion that we have jurisdiction of the controversy presented in this case, we should feel bound to decide it in favor of the defendants, and dismiss the bill on the merits; since we believe the evidence shows that defendant N. C. & St. L. Ry. Co. filed its schedule covering the 70¢ rate from Cartersville, Ga., to Dayton, Tennessee, with the Interstate Commerce Commission, on Feb. 2, 1907, and that it took effect on March 5, 1907; that a copy of this was sent to the C. N. O. & T. P. Ry. Co., and duly stamped by them; that this copy showed the latter railroad as a concurring carrier; that that road actually concurred by receiving freight under that schedule, and making settlements by it, and under it; and we believe, as matter of law, this made the rate a joint one, the matter not falling within the rule later established by the commission, beginning with May 1, 1907, by which an express written concurrence was required, pursuant to certain printed forms prescribed by that body, to be numbered and filed with it. This rate being the lawful one during the period of the shipments of ore which are the subject of this controversy, the railroads were bound to conform to it, or suffer very heavy penalties prescribed by the Interstate Commerce Act. It would in no wise impeach the
198 legality of this rate that the C. N. O. & T. P. Company failed to post this tariff in the office at Dayton. Nor would its operation be in anywise abridged by the fact that the road last mentioned, overlooking the true tariff, quoted to complainant the old tariff previouslyy in force; and that in reliance upon this quotation the complainant made a contract for heavy shipments of ore covering quite a long period. Fixed rates cannot be controlled in this manner. If they could, there would soon be no rates really fixed, and all of the evils of discrimination, rebates &c. designed to be overcome by the Act would again become manifest and active. This does not mean that complainant is without redress for the act of the C. N. O. & T. P. Ry. Co. in misleading it. Complainant has not yet paid that company the extra 10¢ per ton, although the latter has paid the N. C. & St. L. Ry. Co. There is a suit pending between complainant and the C. N. O. & T. P. Ry. Co. in the federal court in Cincinnati. We see no reason why relief cannot be had in that cause. Or if this be wanting it is not evident why the present complainant cannot present *his* claim for reparation before the Interstate Commerce Commission. It seems from the Act and its amendments this reparation does not necessarily take the form of damages. Or if this form of relief be inapplicable to the present status of the

claim there seems no just ground for denying that an application could be made to the Commission for an order restraining the C. N. O. & T. P. Ry. Company from enforcing an unjust demand (if it be unjust), under the Act and its amendments. Mann-Elkin Bill, sec. 12, amending sec. 15 of Original Act; Act to Regulate Commerce as amended to date, sec. 15.

But we are of the opinion that this court really has no jurisdiction of the case. It is true that the Acts of Congress are binding on the states, and that we have held that our state courts may enforce rights of action, in general, arising under federal statutes, yet there are two qualifications. One, where exclusive jurisdiction is vested in the courts of the United States, and the other where
199 the nature of the matter is such that we cannot properly, or safely, deal with it, or the state courts are unfitted for the work. Divine vs. Bank, 125 Tenn., 98. The Act and its amendments were designed to secure reasonable interstate rates, and to prevent discrimination. The Commission is given large powers not only to fix or adjust, raise, or lower rates, but to make rules whereby these rate- can be created or arranged, and used without doing injustice, creating undue hardship, or operating so as to produce discrimination. If the State courts should undertake to construe these rules, as well as the provisions of the statute, (and both must be done to rightly administer the law) there would be great danger of conflicting decisions, and resultant confusion. It is essential, we think, to the harmonious working of the system that it be left wholly in the hands of the Commission, and the federal courts. And we think Congress so intended. It is true, sec. 22 contains the following clause: "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." "This clause however," said the Supreme Court of the United States in Texas & P. R. Co. vs. Abilene Cotton Oil Co., "cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act. In other words, the Act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or other duties imposed by the Act, and the manifest purpose of the provision in question was, to make plain the intention that any specific remedy given by the Act should be regarded as cumulative, where other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the Act." 204 U. S. 446-7.

200 We know of no common law remedies that could be applied to the case before us that would not be wholly inconsistent with the provisions, and purposes of the Interstate Commerce Act and its amendments. It results that the original bill, and the cross bill must be dismissed, for want of jurisdiction of the subject-matters.

NEIL, *C. J.*

201 Supreme Court of Tennessee, at Knoxville, September Term, 1913.

SATURDAY, November 29, 1913.

Court met pursuant to adjournment present and presiding the Honorable Chief Justice M. M. Neil and the Honorable Associate Justices D. L. Lansden, Grafton Green, Arthur S. Buchanan and Samuel C. Williams.

The minutes of Monday November 24, were read and signed when the following proceedings were had, to-wit:—

DAYTON COAL & IRON CO.
vs.
C., N. O. & T. P. RY. CO., N., C. & ST. L. RY. CO., and W. & A. RAILROAD CO.

Reversed and bill dismissed.

Be it remembered this cause came on this day to be heard before the Hon. Supreme Court of Tennessee, on the transcript of the record, assignments of error, and briefs of counsel, whereupon the Court is of opinion and doth adjudge that it has no jurisdiction of the subject-matters of the controversy: and accordingly doth further adjudge and decree that the decree of the Chancellor be reversed and the bill of Dayton Coal & Iron Company and the cross-bill of C. N. O. & T. P. Ry. Co., be dismissed, and that defendants N. C. & St. L. Ry. Co. and W. & A. Railroad Co., recover of Dayton Coal & Iron Co. one half of all the costs of this cause and of C. N. O. & T. P. Ry. Company one half of all said costs, for all of which executions are awarded.

202 Office of Clerk of the Supreme Court for the Eastern Division of the State of Tennessee.

I, S. E. Cleage, Clerk of said Court, do hereby certify that the foregoing is a full, true, correct and complete copy of the transcript of the record, in the cause, Dayton Coal and Iron Company, Ltd. versus C. N. O. & T. P. Ry. Company, N. C. & St. L. Ry. Company and W. & A. Railroad Company, lately pending in said Supreme Court, as the same was certified by Sam Erwin, Clerk and Master of the Chancery Court of Hamilton County at Chattanooga, Tennessee, and of the following papers in connection therewith:

(1) Opinion of the Supreme Court;
(2) Final decree of Supreme Court;

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 22nd day of January, 1914.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE,
Clerk of the Supreme Court of Tennessee.

203 **The Supreme Court of the State of Tennessee.**

THE DAYTON COAL & IRON CO., LIMITED,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. et als.,

Petition for Writ of Error.

To the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee:

The petition of the Dayton Coal & Iron Co., Limited, sets forth that on or about the 29th day of November, 1913, the Supreme Court of the State of Tennessee made and entered a final order and decree herein in favor of the Cincinnati, New Orleans & Texas Pacific Railway Co., Nashville, Chattanooga & St. Louis Railway and Western & Atlantic Railroad Co. and against your petitioner, the Dayton Coal & Iron Co., Limited, in which final order and decree and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of said Dayton Coal & Iron Co., Limited, all of which will more in detail appear from the assignment of errors which is filed with and as a part of this petition.

That the said Supreme Court of the State of Tennessee is the highest Court of the State of Tennessee in which a decision in this suit and this matter could be had.

Wherefore, said The Dayton Coal & Iron Co., Limited, petitions and prays that a Writ of Error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Tennessee, for the correction of errors so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the
204 United States; that proper citation issue, and that the bond herewith presented be approved; and that upon compliance with the terms of the Statute in such cases made and provided, that said bond and Writ of Error may operate as a supersedeas; and that the decree aforesaid of said Supreme Court of the State of Tennessee be reversed.

THE DAYTON COAL & IRON CO., LIMITED
(Signed) By W. B. MILLER, *Attorney.*
(Signed) G. W. WEST,
W. B. MILLER,
1210 *James Building, Chattanooga, Tennessee,*
Attorneys for Petitioner.

The Writ of Error as prayed for in the foregoing petition is hereby allowed this 26 day of January, 1914, and said Writ of Error will operate as a superseseas, the bond for that purpose being hereby fixed at the sum of $750.00 *Dollars.*

Dated this 26 day of January, A. D. 1914.

(Signed) M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

Filed in my office this 29 day of January, A. D. 1914.
(Signed) S. E. CLEAGE,
Clerk of the Supreme Court of the State of Tennessee.

205 The Supreme Court of the State of Tennessee.

THE DAYTON COAL & IRON CO., LIMITED,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. et al.

Bond for Writ of Error and Supersedeas.

Know all men by these presents, That we, the Dayton Coal & Iron Co., Limited, as principal, and (Signed) W. B. Miller as surety, are held and firmly bound unto the Cincinnati, New Orleans & Texas Pacific Railway Co., Nashville, Chattanooga & St. Louis Railway and Western & Atlantic Railroad Co., in the sum of Seven Hundred and Fifty Dollars to be paid by the said obligees, their successors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of January, A. D., 1914.

Whereas, the above named Dayton Coal & Iron Company, Limited, hath prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the Supreme Court of the State of Tennessee in the above styled cause,

Now therefore, The conditions of this obligation are such that if the above named plaintiff in error, The Dayton Coal & Iron Co., Limited, shall prosecute its Writ of Error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

THE DAYTON COAL & IRON CO., LIMITED,
(Signed) By W. B. MILLER, *Attorney.*
206 (Signed) W. B. MILLER, *Surety.*

I hereby approve the foregoing bond and sureties, this 26th day of January, A. D., 1914.
(Signed) M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

207 The Supreme Court of the State of Tennessee.

THE DAYTON COAL & IRON CO., LIMITED,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. et al.

The undersigned defendants in error in the above styled cause, by their attorneys, do hereby expressly waive the issuance and serv-

ice of citation and waive any other or further notice of the filing in this cause of a writ of error and supersedeas from the Supreme Court of the United States to the Supreme Court of Tennessee, and bond therefor and the order allowing said petition and approving said bond.

We hereby agree that the case may be treated as if proper citation and notice had been issued and served upon said defendants, as of the date of the filing of said writ of error, in the manner required by law and the rules of the Court.

This January 29th, 1914.

ALLISON, LYNCH & PHILLIPS,
For C., N. O. & T. P. Ry. Co.
BROWN, SPURLOCK & BROWN,
For N., C. & St. L. Ry. & W. & A. R. R.

208 The Supreme Court of the State of Tennessee.

THE DAYTON COAL & IRON CO., LIMITED, Plaintiff in Error,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. et al.,
Defendants in Error.

Assignment of Error- on Writ of Error from the Supreme Court of the United States to the Supreme Court of Tennessee.

Now comes the said Plaintiff in Error The Dayton Coal & Iron Co., Limited, and in connection with its petition for a Writ of Error, respectfully submits that — the record, proceedings, decision and final judgment and decree of the Supreme Court of the State of Tennessee in the above entitled matter, there is manifest error, in this:

I.

The Supreme Court of the State of Tennessee erred in holding that the Act of Congress *on* 1887, entitled "An Act to Regulate Commerce", 24 Statutes at Large 379, and Amendments thereto, deprived said Court of jurisdiction of the subject matter of said controversy.

II.

Said Court erred in holding and adjudging that said Act and Amendments thereto deprived it of jurisdiction to inquire and determine whether a rate, promulgated and relied on by Defendants in Error, each and all, was lawfully established and valid rate, under the terms os said Act.

III.

Said Court erred in holding that under said Act and Amendments thereto the $.70 rate on ore from Cartersville, Georgia,
209 and other points, relied on by Defendants in Error, each and all, was a lawfully established and valid rate.

IV.

Said Court erred, in that it did not hold, determine and adjudge that the $.60 rate on ore from Cartersville, Georgia, and other points, relied on by Plaintiff in Error, was the true, lawful and valid rate, under the terms, provisions and requirements of said Act, which is conclusive of the question.

V.

Said Court erred in dismissing the bill of complaint and denying to Plaintiff in Error the relief granted by the Chancellor, and in so doing infracted and abridged the rights of Plaintiff in Error as confirmed to it by said Act; and denied to Plaintiff in Error a privilege, immunity and right afforded it under and by virtues of said Act, because the $.60 rate claimed by Plaintiff in Error was the valid and lawful rate under the terms of said Act, and binding on said Court.

VI.

Said Court erred in dismissing the bill, denying all relief and charging Plaintiff in Error with one-half the costs, for that there is no evidence upon which to predicate such action—and the taking of property for the satisfaction of said judgment for costs is, as to Plaintiff in Error, a deprivation of property without due process of law, contrary to the 14th Amendment to the Federal Constitution.

VII.

Said Court erred, in that its judgment, adjudication and decree, denying to Plaintiff in Error an injunction, as decreed by the Chancellor, and mulcting it with costs, is without support in law and fact and therefore deprives it of its property without due process of law, contrary to the 5th Amendment to the Federal Constitution.

(Signed) G. H. WEST,
W. B. MILLER,
Attorneys for Plaintiff in Error.

210 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Tennessee, before you, or some of you, being the highest court of law or equity of the said State, to which a decision could be had in the said suit between the Dayton Coal & Iron Co., Limited, as plaintiff, and the Cincinnati, New Orleans & Texas Pacific Railway Company, the Nashville, Chattanooga & St. Louis Railway Company and the Western & Atlantic Railroad Company, as defendants, wherein was drawn in question the validity of a

treaty or statute of, or an authority exercised under, the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States; and the decision was against the title, right, privilege or exemption especially set up or claimed under such clause of the said Constitution, treaty, statute, or commission: a manifest error hath happened to the great damage of the said The Dayton Coal & Iron Company, Limited, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-
211 preme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of January in the year of our Lord, One Thousand Nine Hundred and Fourteen.

[Seal District Court of the United States, Eastern District of Tennessee.]

HORACE VAN DEVENTER,
Clerk of the District Court of the United States, Eastern District of Tennessee.

Allowed by:

——— ———,
Chief Justice of the Supreme Court of Tennessee.

212 Office of the Clerk of the Supreme Court, for the Eastern Division of the State of Tennessee.

I, S. E. Cleage, Clerk of said Court, do hereby certify that on the 29th day of January, 1914, there was filed in my office the petition of The Dayton Coal & Iron Company, Limited, for writ of error, a copy of which is hereinbefore set forth, with endorsement thereon signed by the Honorable M. M. Neil, Chief Justice of the Supreme Court of Tennessee, reading as follows:

"The Writ of Error as prayed for in the foregoing petition is hereby allowed this 26 day of January, 1914, and said writ of error

will operate as a supersedeas, the bond for that purpose being hereby fixed at the sum of Seven hundred and fifty dollars.

Dated this 26 day of January, A. D., 1914.

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee."

On the same date there was filed in my office the original bond of The Dayton Coal & Iron Co., Limited, with W. B. Miller as surety in the penalty of Seven hundred and fifty Dollars ($750.00) and approved by the Hon. M. M. Neil, Chief Justice of the Supreme Court of Tennessee, a copy of which is hereinbefore set forth.

On the same date there was lodged in my office waiver of Allison, Lynch and Phillips, Attorneys for C. N. O. & T. P. Ry. Co. and Brown, Spurlock & Brown, Attorneys for N. C. & St. L. Ry. and W. & A. Railroad of the issuance or service of citation or further notice of the filing of the petition for writ of error and supersedeas, as hereinbefore set forth.

On the same date there was lodged in my office assignment of error on behalf of the Dayton Coal & Iron Co., Limited, a copy of which is hereinbefore set forth.

On the same date there was lodged in my office the original Writ of error to the Supreme Court of the United States, as hereinbefore set forth, and signed by the Hon. Horace Van de Venter, Clerk of the District Court of the United States, Eastern District of Tennessee.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, Tenn., on this the 30th day of January, 1914.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE, *Clerk.*

Endorsed on cover: File No. 24,076. Tennessee Supreme Court. Term No. 378. The Dayton Coal & Iron Company, Limited, plaintiff in error, vs. Cincinnati, New Orleans & Texas Pacific Railway Company, Nashville, Chattanooga & St. Louis Railway, and Western Atlantic Railroad Company. Filed February 28th, 1914. File No. 24,076.

POOR

Agreed Amendment of Record

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 81.

THE DAYTON COAL & IRON COMPANY, LTD.,

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

It appearing from the transcript of the record in this case, as certified to by the Clerk of the Supreme Court for the Eastern Division of Tennessee, that portions of the record as filed in the Supreme Court of Tennessee and considered by that Court have been omitted from the transcript, the following stipulation is made:

The transcript should contain at page 67 Exhibit "A" to the deposition of F. D. Claggett, a copy of Iron Ore Tariff No. 7, introduced by the defendant in error. The defendants in error introduced a copy of said schedule showing that it was a joint freight tariff upon Iron Ore published by the Nashville, Chattanooga & St. Louis Railway, published in connection with the Cincinnati, New Orleans & Texas Pacific Railway, the Louisville & Nashville Railroad, the Seaboard Air Line Railway and Southern Railway, from points on the line of the Nashville, Chattanooga & St. Louis Railway in Alabama, Georgia and Tennessee to points on the lines of the participating carriers named therein in the states of Tennessee, Georgia and Alabama, and particularly from Bartow, Cartersville, Emerson and Rogers, Georgia, on the Western & Atlantic Railroad, a line operated by the said Nashville, Chattanooga & St. Louis Railway to Dayton,

OOR COPY

Tennessee, on the Cincinnati, New Orleans & Texas Pacific Railway, the rates from said points to Dayton being 60¢ per ton upon iron ore. This tariff was issued and filed with the Interstate Commerce Commission October 31, 1906, effective December the 4th, 1906. It bears I. C. C. No. 1314-A and supersedes 1297-A and Amendment No. 1, but carried the same rate upon ore from Bartow, Cartersville, Emerson and Rogers, Georgia, to Dayton, Tennessee that had been published in prior schedules—namely, 60¢.

2.

It is further stipulated that Iron Ore Tariff No. 8, referred to at page 120 of the transcript of the record, is not fully copied therein; that said Iron Ore Tariff No. 8 contained a schedule of rates from points upon the line or lines of the Nashville, Chattanooga & St. Louis Railway in Alabama, Georgia and Tennessee to points upon the line or lines of the connecting carriers named in said tariff as shown on page 120 of the transcript, and particularly a rate of 70¢ per ton upon iron ore from Bartow, Cartersville, Emerson and Rogers, Georgia, on the Western & Atlantic Line of the Nashville, Chattanooga & St. Louis Railway to Dayton, Tennessee, on the Cincinnati, New Orleans & Texas Pacific Railway. This schedule of rates contained upon its face the words "Supersedes I. C. C. 1314-A." It was issued February 2, 1907, and filed with the Interstate Commerce Commission February 4, 1907, reciting on its face that it was "Effective March 5, 1907."

3.

It is also stipulated that the copy of Iron Ore Tariff No. 8, as contained on page 36 of the transcript of the record incorrectly states the number of the tariff superseded as I. C. C. No. 1344-A. It should read "Supersedeas I. C. C. No. 1314-A."

Nov. 1st, 1915.

W. B. MILLER,
Att'y for Plaintiff in Error.
FOSTER V. BROWN,
FRANK SPURLOCK,
JOSEPH E. BROWN,
Att'ys for Defendants in Error, N., C. & St. L. Ry., & W. & A. R. R.

JAMES J. LYNCH,
Attorney for the Cincinnati, New Orleans & Texas Pacific Ry. Co.

[Endorsed:] File No. 24,076. Supreme Court U. S. October term, 1915. Term No. 81. The Dayton Coal & Iron Company, pl'ff in error, vs. Cincinnati, New Orleans & Texas Pacific Ry. Co. et al. Stipulation of counsel and addition to record. Filed November 5, 1915.

9

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 378 81

The Dayton Coal & Iron Company, Ltd.
(Plaintiff in Error)

VS.

Cincinnati, New Orleans & Texas Pacific Railway Company, Nashville, Chattanooga & St. Louis Railway Company, and Western & Atlantic Railroad Company
Defendants in Error.

ERROR TO THE SUPREME COURT OF TENNESSEE

Assignment of Errors and Brief of Plaintiff in Error

W. B. MILLER
Attorney

MACGOWAN-COOKE, CHATTANOOGA 9712

OOR COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

THE DAYTON COAL & IRON COMPANY, LTD., (*Plaintiff in Error*) *vs.* CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, AND WESTERN & ATLANTIC RAILROAD COMPANY.	In Error to the Supreme Court of Tennessee.

ASSIGNMENT OF ERRORS AND BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was begun in the Chancery Court at Chattanooga to perpetually enjoin an action at law instituted against plaintiff in error, hereinafter called the Dayton Company, by Cincinnati, New Orleans & Texas Pacific Railway Company, hereinafter

called the Cincinnati Southern. The facts averred and undisputed are that early in 1907, the Dayton Company, engaged in manufacture of pig iron at Dayton, Tennessee, found it necessary to contract *in advance* for large supplies of raw material, including iron ore, and made inquiry of Cincinnati Southern road as carrier for the freight rate on ore from Cartersville, Georgia, and nearby points of Emerson and Rogers to Dayton, Tennessee. This inquiry was first made verbally by an assistant of the Managing Director residing at Cincinnati, where its sales office was located. (R. 41-2.) As a further precaution, in April, 1907, the operating office at Dayton, "had the rate confirmed by the agent at Dayton." (R. 42.) The rate quoted was 60 cents per ton in both instances. (R. 36, 42.) *This was the legal rate.*

Shipments were to be routed over Western & Atlantic Railroad Company, hereinafter called W. & A. Railroad, from Cartersville and other Georgia points to Chattanooga, and thence to Dayton over the Cincinnati Southern. The two lines at the time, and *continuously since*, were permitted to and did actually charge local rates aggregating only 60 cents per gross ton from the Georgia points to Dayton, divided as follows: (R. 36, 55, 57, 86, 93)

Cartersville and other points to Chattanooga, via W. & A.	40 cents
Chattanooga to Dayton, via Cincinnati Southern	20 cents
Total	60 cents

Published tariffs at that time and ever since by both roads carried local rates the sum of which was 60 cents, as shown above. (R. 36, 55, 57, 86, 93.)

On the strength of the rate thus quoted, confirmed, and authorized by legal tariffs of both roads, the Dayton Company contracted for a very large amount of ore at Cartersville, Emerson and Rogers, to be delivered over a period of months, informing the Cincinnati Southern of its intention; *and it sold iron for future delivery over like period against the purchases thus made,*—all according to usage and practice of manufacturers throughout the country. (R. 2-8, 41-2.) There was no other railroad or agency by which this ore could be moved to Dayton save the route in question. (R. 42-3.)

Western & Atlantic Railroad was leased by defendant Nashville, Chattanooga & St. Louis Railway, hereinafter called the N. C. & St. L., and was operated in the name of the W. & A. under a contract with the State of Georgia as owner at the time of all the transactions herein shown. The two latter roads answered jointly, averring the facts above, and show-

ing that N. C. & St. L. was a privy of and party to all arrangements with the W. & A. during said period, and *vice versa.* (R. 17, 18.)

When delivery of the ore began it was the course of business for the W. & A. or N. C. & St. L. to deliver the cars from Cartersville and other Georgia points covered by the 60 cent rate quoted, to Cincinnati Southern at Chattanooga, and from there they were delivered by Cincinnati Southern to plaintiff in error at Dayton. At the beginning the rate was 60 cents, collected by the delivering carrier at Dayton, and divided between the two carriers as previously shown.

The complainant avers that this 60 cent rate was the *legal rate* throughout the transactions covered by this controversy. (R. 6-7.) Five reasons are specifically assigned in the complaint why 60 cents was the valid and lawful rate. (R. 6-7.) The N. C. & St. L. and the W. & A. Railroads concede the 60 cent rate was the lawful rate up to March 7th, 1907, but insist thereafter the valid rate was 70 cents. A quotation from their joint answer is:

> "It may be true that the complainant at the beginning of the year 1907 was named a rate of 60 cents per ton, because up until March 7th of that year *that was the true rate* from Cartersville and other points in Georgia to Dayton, Tennessee, for the carriage of iron ore and had

> been the rate for some period of time prior to that day. * * * * * It is true that some time after the beginning of 1907, that is on or after March 7th of that year, the ore shipments were billed to complainant at 70 cents per ton instead of 60 cents per ton as had been previously charged and collected, because *on the latter date the new through tariff rate went into effect as already hereinbefore stated.*" (R. 19-20.)

They further aver in their answer that the 70 cent rate was the *joint* rate established by them *"in connection" with the Cincinnati Southern thus*:

> "These rates were filed with and approved by the Interstate Commerce Commission. According to said tariff sheets the rate on iron ore from the points in Georgia to complainant's plant was 60 cents per ton from some time in 1906 to the 7th day of March, 1907, when the new *joint* freight tariff made by these respondents *in connection* with the Cincinnati, New Orleans & Texas Pacific Railway Co., and other carriers, became effective. The last named tariff sheet was issued February 2nd, 1907, filed with the Interstate Commerce Commission, and as provided therein the freight rate on iron ore from Bartow, Cartersville, Emerson and Rogers, all in the state of Georgia, to Dayton, Tennessee, was 70 cents per ton of 2240 pounds. (R. 18-19.)

The Cincinnati Southern made a like concession as to the *original validity of the* 60 *cent rate*, thus:

"As authorized to do by the Act to Regulate Commerce, as the same existed during the period covered by this controversy, being the Act as amended in 1906, to which this respondent and its co-defendant N. C. & St. L. Ry. were alike subject, the said N. C. & St. L. Ry. duly filed and published the schedule known as I. C. C. No. 1351-A, showing the joint rate for the through transportation of iron ore from Cartersville, Georgia, and also from Emerson and Rogers, Georgia, to Dayton, Tennessee, to be 70 cents per ton of 2240 pounds, based on the minimum weight of the capacity of the car, but if the car was actually weighed, 90% of the capacity of the car, and this tariff became effective on March 5th, 1907, and binding not only upon the N. C. & St. L. Ry. and this respondent, but equally binding upon the complainant and any other shipper. * * * * * It is true that after said through tariff of 70 cents went into effect on March 5th, 1907, this respondent did bill to the complainant freight on iron ore shipped to Dayton from Cartersville, Georgia, and from Emerson and Rogers, which were covered by said through tariff rate as aforesaid, at the rate of 70 cents per ton and insisted and still insists upon the payment of that rate." (R. 14-15.)

Note.—That 60 cents was the sum of the local rates prior to March 5th, 1907, is seen to have been conceded by all the carriers. And the question is therefore sharply presented as to whether there was

a valid increase of the rate to 70 cents on March 5th-7th, 1907, as the carriers insist.

The bill avers that there was *not*, and that despite this fact the Cincinnati Southern had sued to collect from the plaintiff the difference of 10 cents per ton on all deliveries dating from May 15th, 1907, to June, 1909, inclusive, aggregating $4,933.08; that although the N. C. & St. L. and W. & A. Railroad Companies were not parties, the suit was in reality for their benefit, and hence they were joined as defendants to the end that multiplicity of litigation might be avoided and the controversy centralized and a decree entered settling all rights involved. (R. 6-8.) A preliminary injunction was granted against a further prosecution of the action at law (R. 8-9), but was subsequently dissolved, (R. 11) after which the bill was amended (R. 11-12).

The case was remanded to the rules for proof, and after the proof was all in the Cincinnati Southern filed a cross bill averring that it had *settled* with N. C. & St. L. Ry. on the 70 cent rate, and that if such rate was unlawful, as the Dayton Company claimed, the N. C. & St. L. should refund to it the excess of $4,933.08; otherwise the Dayton Company should pay it that amount. (R. 105-9)

The specific averment, after setting forth the items aggregating $4,933.08, is:

"Cross complainant therefore charges that these sums, with interest, are due from the defendant Dayton Coal & Iron Company, Ltd., because said rate of 70 cents per ton, under which said charges were made, was a rate published by the defendant, Nashville, Chattanooga & St. Louis Ry., and filed by it with the Interstate Commerce Commission, and that cross complainant was *bound under the law* to comply with said rate. Cross complainant charges, however, that if the court should find that for any reason this was *not a legal rate*, then cross complainant, having paid same to the Nashville, Chattanooga & St. Louis Ry., by virtue of said Company's claim under the rate published, and insisted upon by said Company, then, in that event said Nashville, Chattanooga & St. Louis Ry. is indebted to cross complainant for the above named sum and interest from the dates shown." (R. 108-9.)

Note.—The cross complaint does not maintain as did the answer of Cincinnati Southern, filed several months previous, that the 70 cent rate was a "*joint*" rate, but that it gave "evidence of its concurrence therein and acecptance thereof," as the answer had insisted. (R. 14-15.)

The Chancellor decreed:

"That the rate of 70 cents per ton promulgated and contended for by the defendants to the original bill was and is *illegal*, inequitable

> and unenforceable as against complainant, and that complainant was entitled to the 60 cent rate as contended for by it herein." (R. 147.)

He accordingly further decreed that the action at law be perpetually enjoined and that the Dayton Company recover its costs. (R. 147-8.) There was an appeal by the Cincinnati Southern and N. C. & St. L. Ry. to the Supreme Court of Tennessee, (R. 148-9) where it was ruled:

(1) That the state courts had no jurisdiction to determine which rate was *lawful.* (R. 156)

(2) That if the rate was *lawfully* changed from 60 to 70 cents per ton, the *only* remedy of the Dayton Company was two-fold,—(a) in the Federal Courts or (b) before the Interstate Commerce Commission. (R. 155-6.)

On the first point the court said:

> "But we are of the opinion that this court really has no jurisdiction of the case. It is true that the Acts of Congress are binding on the States, and that we have held that our state courts may enforce rights of action in general arising under the Federal Statutes, yet there are two qualifications. One where *exclusive jurisdiction* is vested in the courts of the United States and the other where the nature of the matter is such that we cannot properly or safely deal with it, but the state courts are unfitted for

the work." *Divine vs. Bank*, 125 Tenn., 98. The Act and its Amendments were designed to secure reasonable interstate rates and to prevent discrimination. The Commission is given large powers not only to fix, but adjust, rates or lower rates or make rules whereby these rates can be created or arranged and used without doing injustice, creating undue hardship or operating so as to produce discrimination. If the State courts should *undertake to construe* these rules as well as the provisions of the statute (and both must be done to rightly administer the law) there would be great danger of conflicting decisions and resultant confusion. It is essential we think to the harmonious working of the system that it be left wholly in the hands of the Commission and of the Federal Courts. And *we think Congress so intended.* * * * * * * * It results that the original bill and the cross bill must be dismissed for want of *jurisdiction of the subject matter.* (R. 156)

On the second point the Court said:

"If we could reach the conclusion that we have jurisdiction of the controversy presented in the case we should feel bound to decide it in favor of the defendants and dismiss the bill on the merits; since we believe the evidence shows that defendant N. C. & St. L. Ry. Co. filed its schedule covering the 70 cent rate from Cartersville, Georgia, to Dayton, Tennessee, with the Interstate Commerce Commission on February 2, 1907, and that it took effect on March 5th,

1907; that a copy of this was sent to the C. N. O. &. T. P. Ry. Co. and duly stamped by them; that this copy showed the latter railroad as a concurring carrier; that that road actually concurred by receiving freight under that schedule and making settlements by it and under it; and we believe as *matter of law* this made the rate a *joint* one, the matter not falling within the rule later established by the Commission, beginning with May 1, 1907, by which an express written concurrence was required pursuant to certain printed forms prescribed by that body to be numbered and filed with it.

This rate being the *lawful* one during the period of the shipments of ore which are the subject of this controversy, the railroads were bound to conform to it or suffer very heavy penalties prescribed by the Interstate Commerce Act." (R. 155.)

The decree of the Tennesse Supreme Court recites "*the Court is of opinion and doth adjudge that it has no jurisdiction of the subject matter of the controversy.*" (R. 157.) The case was brought here by Writ of Error and the following—

ERRORS ASSIGNED.

(1) "The Supreme Court of the State of Tennessee erred in holding that the Act of Congress 1887, entitled An Act to Regulate Commerce, 24 Statutes

at Large 379, and Amendments thereto, deprived said court of jurisdiction of the subject matter of said controversy.

(2) Said court erred in holding and adjudging that said Act and Amendments thereto deprived it of jurisdiction to inquire and determine whether a rate, promulgated and relied on by defendants in error, each and all, was *lawfully* established and a *valid* rate, under the terms of said Act.

(3) Said Court erred in holding that under said Act and Amendments thereto the $.70 rate on ore from Cartersville, Georgia, and other points, relied on by defendants in error, each and all, was a *lawfully* established and *valid* rate.

(4) Said Court erred in that it did not hold, determine and adjudge that the $.60 rate on ore from Cartersville, Georgia, and other points, relied on by plaintiff in error, was the true, lawful and valid rate, under the terms, provisions and requirements of said Act, which is conclusive of the question.

(5) Said court erred in dismissing the bill of complaint and denying to plaintiff in error the relief granted by the Chancellor, and in so doing infracted and abridged the rights of plaintiff in error as confirmed to it by said Act; and denied to plaintiff in error a privilege, immunity and right afforded it un-

der and by virtue of said Act, because the $.60 rate claimed by plaintiff in error was the valid and lawful rate under the terms of said Act, and binding on said Court.

(6) Said Court erred in dismissing the bill, denying all relief and charging plaintiff in error with one-half the costs, for that there is *no evidence* upon which to predicate such action—and the taking of property for the satisfaction of said judgment for costs is, as to plaintiff in error, a 'deprivation of property without due process of law,' contrary to the 14th Amendment to the Federal Constitution." (R. 160-1.)

We now consider the facts. We believe that they are undisputed and that the Supreme Court of Tennessee was correct in its view that the record presents a two-fold question of (a) jurisdiction and (b) legality of an alleged rate *"as matter of law."* (R. 155-6)

THE FACTS.

Shortly after the contract for ore became effective the local office of Cincinnati Southern at Dayton demanded 70 cents per gross ton for ore delivered from Cartersville and other Georgia points, and the Dayton Company refused to pay more than 60 cents per ton. The first demand for the increase was for the May and June 1907 deliveries. (R. 9, 78-9, 108.)

Thereupon deliveries were "billed" to the Dayton Company at 70 cents and an arrangement entered into whereby 10 cents per ton was held in suspense "subject to approval of connection south of Chattanooga." (R. 78-9.) This system of accounting was practiced for months between the receiving clerk of the Dayton Company and the local agent of the Cincinnati Southern. (R. 55, 78-9.) During this period the Dayton Company received the greater portion of the ore and *actually paid the freight on a basis of 60 cents per ton.* Apparently this was because both the Dayton Company and the Cincinnati Southern held the view that 60 cents per ton was the lawful rate—and the course of refund was in accordance with custom in cases of erroneous billing.

The matter was not deemed of sufficient moment to reach the managing officials of either company until *June 26, 1908* (R. 55, 69), and when the ore shipments had been almost completed. The Dayton Company was in ignorance of the fact that the claim of 70 cents per ton was based on an *alleged tariff* of N., C. & St. L. or W. & A. railroads, up to February 10, 1908. It knew the ore had been billed during part of the time at 70 cents per ton and it had participated in an arrangement whereby 10 cents per ton was held in "suspense"—but at no time had its attention been actually drawn to a claim that 70 cents per ton was claimed as the *lawful* rate, or that there was a tariff justifying the same.

When this latter was brought to its attention on February 10, 1908, its cashier wrote the Agent of Cincinnati Southern:

> "Referring to yours this date * * * We have been shipping this ore all along on the understandin gthat *the rate* was 60 cents, and we have never been advised of any change; otherwise, we should have certainly *discontinued shipments.* Under the circumstances we do not see our way to make any change in our records." (R. 70-1.)

The first direct contention that the 70 cent rate was *valid* (that it was the *legal rate*) and that the previous *joint* rate of 60 had been superseded, was apparently brought to the attention of the Cincinnati Southern officials in July, 1908. Witness Claggert, of Cincinnati Southern, testified (R. 53):

> "Q. 31. Now you stated in chief that when this advance of 10 cents per ton to Dayton, Tenn., was brought to the attention of your company, the C., N. O. & T. P., that your company wrote the initial carrier drawing its attention to this advance; will you tell us the *beginning date* of that correspondence?
>
> A. July 27, 1908.
>
> Q. 32. Will you just read into the record what was said to the initial carrier on that subject; file an exact copy of the letter to which you

refer as an exhibit to your deposition, as you prefer?

A. I file herewith copy of the letter to which you refer as Exhibit B to this, my deposition.

Q. 33. I find that letter purports to have been written or signed by Mr. Poveleite, your general freight agent.

A. Yes, sir.

Q. 34. Now as I understand, the copy of the letter which you file as Exhibit B is a copy of letter that was sent in due course to Mr. Charles Barham, general freight agent of the N., C. & St. L. Railway Company, at Nashville, Tenn?

A. Yes, sir."

The letter referred to, omitting the address is as follows (R. 67-8):

"July 27, 1908.

"Iron Ore from Cartersville and Emerson, Ga., to Dayton, Tenn.

"Personal."

"Dear Sir: Will you please refer to your file 2739-S, February 22, 1906, regarding rate of 60 cents per ton on iron ore from Cartersville, Ga., to Dayton, Tenn.? In *line with this correspondence* there was issued by you * * * amendment * * * carrying rate of 60 cents per ton. This rate was subsequently carried in

your Iron Ore Tariff * * * issued August 18, 1906, and again * * * August 31, and contained in I. C. 1314-A, issued October 31, 1906. Based on this, the Dayton Coal and Iron Company arranged contract with the mines named for a large supply of iron ore which began to move early in 1907.

"I find that *without notice or reference to correspondence* your office issued February 2, 1907, I. C. C. 1351, cancelling 1314-A, and in lieu of the 60-cent rate to Dayton put in rate of 70 cents. *No notice* of this itself being received at this, shipper's, or consignees', also the tariff itself being received at this office with a lot of others, making it impracticable, of course, to check up and ascertain all changes made. I also find that we received Division Basis 3025 *corrected*, showing divisions from Emerson and Cartersville to Chattanooga, 40 cents; beyond, 20 cents, on business to Dayton, Tenn. This division sheet has *never been canceled* by any division sheet received at this office. It would certainly seem that we are justified in expecting our attention called to the fact that you intended to withdraw the 60-cent rate in view of the fact *it was issued in line with correspondence which we took up with you;* and having *no notice* of your intention we quoted the 60-cent rate early in 1907 to the consignees and they went ahead with the contract. I should like to have promptly your suggestions as to how this matter can best be adjusted, more particularly in view of the fact that the case is likely to be taken into

court before the consignee will pay the additional amount. You understand, of course, that from our record of the division sheets we would naturally understand your line is *still accepting 40 cents per ton to Chattanooga out of the through rate published.* Please let me have immediate reply." (R. 67-8.)

Again on May 1, 1909, after a controversy for some time, and review of the correspondence, Freight Traffic Manager Biles, of Cincinnati Southern (R. 54, 69) wrote Mr. T. C. Powell, its vice-president, thus (R. 69-70):

"Cincinnati, O., May 1, 1909.

"Relations with the Dayton Coal and Iron Company.

* * * "Early in 1906 the Dayton Coal and Iron Company asked us to arrange for rate on ore from Cartersville, Ga., to Dayton, Tenn. We took it up at once with the N., C. & St. L. and Seaboard Air Line, but the latter declined to *join* in a reduction in the rate, while the N., C. & St. L. published, effective February 23, 1906, rate of 60 cents per ton, taking 40 cents to Chattanooga, allowing 20 cents north. * * * In August, 1906, the N., C. & St. L. superseded their original tariff covering this rate by issuing Ore Tariff No. 5. Mr. Knox, then general freight agent, *specifically called attention* to this supersedure, although the rate was not changed, and in letter under date of August 7, 1906, asked

specificaly for receipt of the tariff. No further correspondence was had in connection with the question until April, 1907, at which time the D. C. & I. Company wrote our agent at Dayton asking for rate on ore from Cartersville; our clerk Kerr answered the agent at Dayton that the rate on ore from Cartersville to Dayton was carried in our Raw Material Tariff R-196, which showed the rate to be 60 cents per ton; meantime, Mr. Whitaker, of the Cincinnati office of D. C. & I. Company, claims he took up with this office the question of securing cars to handle a movement of ore, and claims he also took it up with the N., C. & St. L. people. Though this question of car supply does not appear to have been handled by correspondence.

"On April 23, 1907, we received request from the agent at Dayton to quote rate on ore from Emerson, Ga., to Dayton, and reply was made also by our clerk, Kerr, quoting 60 cents per gross ton; made 40 cents to Chattanooga, 20 cents north; and the agent was requested to advise if the rate would be used, but no reply was given by him. We are unable to locate where the clerk got his authority for quoting 40 cents proportion from Emerson to Chattanooga.

"Our attention was not called to the matter further until June 26, 1908, when Mr. Molloy advised under his file F-222 of that date that the D. C. & I. Co. had deducted $1194.43 from their settlement on account of the difference in the rate on ore. We wrote the D. C. & I. Com-

pany advising them that the N., C. & St. L. had issued rate of 70 cents from Cartersville and Emerson to Dayton, and that we could not undertake to protect other than this legal rate.

"The *whole difficulty* appears to have arisen from the fact that when the N., C. & St. L., *without any advice of their intended action*, issued Iron Ore Tariff No. 8, effective March 5, 1907, advancing the rate from Cartersville and Emerson to Dayton to 70 cents per ton. The tariff was received through the usual course and referred to the desk in charge of the clerk previously mentioned, who appears, however, to have never checked the tariff, but simply put it into the foreign file case, allowing *our* Raw Material Tariff to *remain unchanged*, whereas he should have checked and made necessary correction and given proper notice of the change on the rate.

The Dayton Coal and Iron Company in the meantime insist that the quotation above referred to was in the nature of a contract, necessitating our applying the 60-cent rate from both Emerson and Cartersville. I have in my letters to Mr. Whitaker pointed out that the law does not permit application of other than legally published rates, and we must necessarily collect on basis of 70 cents per ton.

Although Mr. Whitaker claims he took the matter up with us and the N., C. & St. L. in April, 1907, for car supply, and in this way giv-

ing us notice of the movement, the comptroller's records indicate that the disputed items cover the months of August, September, October, November and December, 1907, and January, 1908.

"Without attempting in any way to condone the error of the clerk making the erroneous quotations in April, it would seem from this that the D. C. & I. Co. are insisting on the technicality of the quotation and endeavoring to enforce settlement on the 60-cent basis.

"The further fact that the clerk making the error was relieved before this trouble was brought to our attention, in no way helps out the matter of settlement with the D. C. & I. Co.

"The refusal of the W. & A. to recede from their position in advancing the proportion to Chattanooga from 40 cents to 50 cents per ton, and the further fact that the rate was not used by the D. C. & I Co. from April up until August, 1907, are also circumstances that make it almost impracticable to adjust this matter by a reparation claim before the commission." (R. 69-70.)

From the above letters it appears distinctly and is nowhere disputed that the practice between the local offices of the Dayton Company and the Cincinnati Southern at Dayton, whereby 10 cents per ton was held in suspense, was viewed as a "correction" and that "Division Sheets" between the two carriers, in accordance with their previous *joint* rate, which, by

the way, aggregated the sum of their *local rates*, had been passed and accepted by the carriers without question, at least up until October 10, 1907, at which time General Freight Agent Poveleite, of Cincinnati Southern, wrote its comptroller, in part (R. 81):

> "I note that these claims have been *paid* on basis of 60 cents per ton. It will be proper for you to protect this rate on shipments coming from Cartersville, which is in line with our R-196, I. C. C., 3269. This rate should divide by allowing the N., C. & St. L. to our tracks at Chattanooga 50 cents per ton, the C., N. O. & T. P. accepting the balance. * * * *We will arrange to correct our issue to basis of 70 cents from Cartersville.*" (R. 81.)

The "correction" was *not* made, however.

It seems that similar controversies with shippers had been adjusted on the 60-cent rate from a letter to Mr. Poveleite of *January* 2, 1909, by one of his subordinates, entitled "Ore from Emerson and Cartersville, Ga., to Dayton, Tenn.," which recited, in part (R. 39):

> "The N., C. & St. L. in their Ore Tariff No. 8 publish rate of 70 cents from Emerson which divides by allowing 50 cents to our tracks Chattanooga and 20 cents beyond, and *this rate has never been reissued by us.* The tariff also publishes a rate of 70 cents from Cartersville, while *our* R-196, I. C. C., 3269, publishes a rate of

60 cents, this issue also showing the *divisions* which are as follows:

W. & A., 40 cents from C., N. O. & T. P. tracks; beyond, 20 cents.

"I understand you recently had conversation with Tennesse Coal and Iron Company people in regard to this 60-cent rate. In view of this, will you kindly instruct as to disposition of attached papers. Our claims 45092 and 48955, which covered *similar cases, were settled on basis of the 60-cent rate.* (R. 39.)

Another subordinate wrote Mr. Arbogast, of Cincinnati Southern (R. 38), touching such claims, in January, 1909, in part:

"These claims were *settled* on basis of 60 cents per ton, which is published in our issue R-196. * * * N., C. & St. L. Ore Tariff No. 8 *advances* the rate to 70 cents per ton, dividing 50 cents to Chattanooga and 20 cents for our line; but *our issue was never corrected.* Presume you will wish to have *our tariff* put in line." (R. 38.)

The record does not disclose that Cincinnati Southern's tariff *was ever* "put in line." Considerable additional correspondence between the carriers was had, the N., C. & St. L. denying the 60-cent rate and the Cincinnati Southern insisting on its validity. At the same time the latter denied the legality of the

70-cent rate and the former insisted thereon. On October 3, 1908, Mr. Poveleite, for Cincinnati Southern, wrote Mr. Barham, of N., C. & St. L., another *"Personal"* letter touching the controversy, in reply to one from the latter, which was not satisfying, and said (R. 103):

> "Your letter fails to answer the particular point we raise; namely, increase in the rates in face of contract based on your tariff rate and *without notification to the parties concerned or to this office* of your intention to *revise* the rates; neither do you answer specifically the point in regard to the *divisions* of the new rate, which, according to our records, would *still show* the N., C. & St. L.'s proportion as 40 cents per ton. This matter will undoubtedly be taken before the Interstate Commerce Commission and *if our records are brought into evidence* they will show clearly that the N., C. & St. L.'s provisions provide for *no increase* in the proportion of your earnings, although as a matter of fact I understand you have erroneously been allowed 50 cents per ton out of the 70c rate.
>
> As a matter of equity it certainly does not seem right that *just at the time the contract was being made* an advance of 10 cents per ton should have been put into effect *without any notice* to the people most *vitally concerned* in the rate, and as a matter of justice to ourselves we certainly should have had *some premonition* of it:

in order that *our* records might have been properly revised.

The manner of handling this question has put us in an extremely embarrassing position, and I hoped to have definite advice from you with respect to the points raised before this." (R. 103.)

To the above Mr. Barham replied that he and his company could take care of themselves before the Commission, adding "at least, we have sufficient experience." (R. 104.)

The controversy continued under the "suspension" arrangement as to the extra 10 cents per ton (R. 78-80) until the vice-president of Cincinnati Southern entirely *changed front* and demanded of the Dayton Company payment of the extra 10 cents per ton on May 4, 1909. He then insisted 70 cents was the *legal tariff* because "published by the initial line and under the law we are required to enforce collection of freight charges on that basis." (R. 68.)

LOCAL RATES.

During the entire period in controversy N. C. & St. L. (W. & A.) had a *local* rate of 40c on ore from Cartersville and other points to Chattanooga. (R. 133-7.) And during such period Cincinnati Southern had a *local* rate of 20c from Chattanooga to Dayton. (R. 130-132.)

THROUGH ROUTE AND JOINT RATE.

A *through* route from Cartersville to Dayton, via Chattanooga, and a *joint* rate of 60c thereover were established by these carriers and sanctioned by the Commission in 1906, and so published by both carriers. (R. 67, 69.) This publication was continued by the Cincinnati Southern *throughout* the period of ore deliveries. (R. 29, 34, 140, 67, 69.)

N. C. & St. L. published same 60c *joint rate* to March 5th, 1907, when it alone published a rate of 70 cents from Cartersville to Dayton, (R. 102) without advising Cincinnati Southern; and without even asking the latter to change the *through route* or the *joint rate*. The tariff it thus issued recited it was published "in *connection* with * * * Cincinnati, New Orleans & Texas Pacific Railway" and others, (R. 125) and that it was "effective February 26th, 1907." (R. 122.) It further recited "The Traffic Officials of participant lines *will certify* to the Interstate Commerce Commission *concurrence* in the rates published herein." (R. 125, 120.)

CONCURRENCES.

But Cincinnati Southern *did not* subsequently certify its concurrence. On August 23rd, 1907, it certified that it—

> "* * * * assents to and concurs in the publication of *any* freight rate, schedule, or sup-

> plement thereto, which Nashville, Chattanooga & St. Louis Railway Co. or its agent *may* make and file in which it is shown as a participating carrier * * * * until this authority is revoked by formal and official notices of revocation placed in the hands of the Interstate Commerce Commission and of the carrier to which this concurrence is given." (R. 127-8.)

The *concurrence* quoted shows it had no application to *previous tariffs*—only to subsequent ones. Obviously, this was because about May, 1907, the Commission required more formal concurrences. (R. 144.)

On October 5, 1906, N. C. & St. L. Railway Co. had filed a concurrence in the 60c rate subsequently issued and carried by Cincinnati Southern (R. 29, 34) reading:

> "This is to certify that the Nashville, Chattanooga & St. Louis Railway Co. assents to and concurs in *all joint tariffs* or other issues which in any way affect *joint rates*, which *may hereafter be* issued by other common carriers, and in which the said Nashville, Chattanooga & St. Louis Railway Co. is named as a party thereto excepting in cases where the said Nashville, Chattanooga & St. Louis Railway Co. shall give the Commission notice to the contrary." (R. 129.)

Note.—N. C. & St. L. (W. & A.) is named as par-

ticipant in I. C. C. No. 3269, published by Cincinnati Southern, effective January 6, 1907, (R. 29) carrying a 60c rate (R. 34) and *subsequent issues of this tariff.*

Cincinnati Southern on April 26, 1909, certified its concurrence "in the publication and filing of any freight schedule * * * * which Nashville, Chattanooga & St. Louis Railway Company, or its agent, *makes and files* in which it is shown as a participating carrier, and hereby makes itself a party to and bound thereby in so far as such schedule contains rates applying via its line, etc." (R. 128.)

This was after the ore had all been delivered.

DEFINITIONS AND COMMISSION RULINGS APPLICABLE.

The following definitions and Commission rulings, introduced in evidence by consent, are deemed material:

> DEFINITIONS: "The term '*joint rate*' as used herein is construed to mean a rate that extends over the line of two or more carriers and that is made by *agreement* between such carriers. (R. 143.)
>
> " 'Joint Tariffs' are those which contain or are made up from such 'joint rates.' (R. 143-4.)

"If no specific rate from point of origin to destination of a through shipment is provided, and no specific manner of constructing combination rate for it is prescribed, the *lowest combination of rates* applicable via the route over which the shipment moves is the *lawful rate* for that shipment." (R. 144.)

"A concurrence does not confer authority upon *either carrier or agent to cancel tariffs of concurring carrier*, and therefore, tariffs issued under concurrence may not asume to cancel, or carry notation of cancellation of, tariffs of and issued by concurring carriers. Such cancellations must be made by the carrier that issued the tariff that is to be canceled." (R. 144.)

During ore deliveries, probably May, 1907—possibly before—the Commission ruled:

"A carrier has no means of preventing another carrier from naming it as a party to a joint tariff without proper authority so to do. It cannot, however, be bound by such unauthorized act, and it is its obvious duty to refuse to recognize or apply any such unlawful issue. It should also at once call attention of the Commission and of the one that issued the tariff to such erroneous action." (R. 145.)

PROPOSITIONS OF FACT.

First. A *through route* and the *joint rate* applicable from Cartersville, Ga., to Dayton, Tenn., were

lawfully established, *agreed* on by the carriers, and sanctioned by the Commission in 1906, and subsequently carried without change by *both carriers to February*, 1907. This is shown by the tariffs of both carriers, by the pleadings of both, and by letters of their chief officials. (R. 67, 69.)

Second. Knowing the Dayton Company made pig iron for future delivery, and might purchase ore at Cartersville for use at Dayton, to be shipped via Chattanooga, over a period of months, one carrier quoted the *joint rate* of 60c applicable to the *through route.*

Third. The carriers were conscious that sales of pig iron were made against the ore thus contracted, and that the freight rate so quoted from Cartersville to Dayton was the basis of the ore purchase and the iron sales. (R. 41-43.)

Fourth. When Dayton Company became obligated to take the ore, N. C. & St. L. Co., *without notice*—save such as resulted as "matter of law" from the filing of a new tariff schedule with the Commission and mailing a copy thereof to Cincinnati Southern—claimed to (1) "*supersede*" the 60c lawfully established *joint rate*, and (2) to *substitute* therefor a *new joint rate* of 70c—without concurrence or knowledge of Cincinnati Southern—the other party thereto.

Fifth. When attention of Cincinnati Southern was drawn to effort of N. C. & St. L. to "supersede" the 60c joint rate, (June 26, 1908,) the ore was largely delivered, and it immediately and persistently thereafter, during the entire period of delivery, resisted and vigorously protested against the proposed change.

Sixth. During the entire period the "division basis" or rate sheets, by which settlements were made between the carriers, was 60c and Dayton Company paid no more, always maintaining it was the lawful rate.

QUESTIONS RESULTING.

(a) May state tribunals inquire as a fact if a joint rate of interstate carriers, *lawfully established, has been superseded, suspended or canceled?*

(b) If not expressly or by inference forbidden so to inquire, then by the terms of the Act, on the facts related, *was the joint rate of* 60c, *(agreed on, sanctioned and published by the two carriers,) either superseded or canceled by the action of N. C. & St. L. in February*, 1907?

(c) If the pre-existing joint rate was affected by such action of N. C. & St. L., *in what manner?* Was a 70c rate *substituted* as the carriers claim—or did

60c, the sum of the *two locals*, become and continue as the *legal rate?*

ARGUMENT.

Stripped of redundancy, before the Supreme Court of Tennessee, the shipper asserted and the carriers denied the court had jurisdiction to inquire whether the *original* joint and lawfully established rate from Cartersville to Dayton, via Chattanooga, had been changed in the manner required by the Act. And if so, what change therein resulted. No question of reparation was involved; nor as to *reasonableness* of rates. Of course, State tribunals cannot fix interstate rates or judge of their reasonableness. If a rate is *legal* it is *reasonable* until it is lawfully changed. The bill charges 60c per ton the lawful rate—consequently, that the 70c rate was illegal and unreasonable. If the 70c rate was *illegal*, it was in law and fact unjust and unreasonable. The Supreme Court of Tennessee thought it was forbidden to ascertain and enforce the legal rate. (R. 156.)

We are aware of no decision by this Honorable Court denying to the Tennessee court jurisdiction under like circumstances. Our view is that the right asserted under the Commerce Act is one which *all courts must adjudge and protect.* A Federal question is thus presented—but this does not preclude the exercise of jurisdiction by state tribunals in the

first instance, though ultimately it is reviewable here. We understand from the days of The Federalist, while some controversy has existed and the line has not always been clearly drawn, yet in principle it has been uniformly ruled that the state courts have jurisdiction to enforce rights of this character, and *it is their imperative duty to do so.* Thus, Mr. Justice Bradley, in *Claflin vs. Houseman,* 93 U. S. 130-143, (Italics ours in this and subsequent quotations) said:

> "The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State; concurrent as to place and persons, though distinct as to subject matter. Legal or equitable rights, acquired *under either system* of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under state laws, may be prosecuted in the State Courts, and also, if the parties reside in different states, in the Federal Courts. So rights, whether legal or equitable, acquired under the laws of the United

States, may be prosecuted in the United States Courts, or in the State Courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress *may, if it see fit, give to the Federal Courts exclusive jurisdiction.* * * * * If an Act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some Act of Congress, by a proper action in a State Court. The fact that a State Court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also the laws of the United States, and is *just as much bound to recognize these as operative within the State as it is to recognize the state laws.* The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the Courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as *courts of the same country*, having jurisdiction partly different and partly concurrent."

And in *Pennsylvania R. Co. vs. Puritan Coal Min. Co.*, 237 U. S., 131, this Honorable Court, through Mr. Justice Lamar, observed of this Act:

"Construing, therefore, Sections 8, 9, and 22, in connection with the statute as a whole, it appears that the act was both declaratory and

creative. It gave shippers new rights, while at the same time preserving existing causes of action. It *did not supersede the jurisdiction of state courts in any case, new or old,* where the decision did not involve the determination of matters calling for the exercise of the *administrative power* and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal Courts *had otherwise been made exclusive.* * * * * There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the Federal Courts. But it must be borne in mind that there are *two forms of discrimination,*—one in the *rule* and the other in the *manner of its enforcement;* one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the *rule of practice* itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by *its enforcement.* When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States

courts of competent jurisdiction, as provided in Section 9.

But if the carrier's rule, fair on its face, has been *unequally applied*, and the suit is for damages by its *violation or discriminatory enforcement*, there is *no administrative question involved*, the courts being called on to decide *a mere question of fact* as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted *either in the state or Federal Courts.*"

We complain of no "enforcement" of an unreasonable rule, but rather of a proposed "unequal application" of a just rule. Our contention is that the "carrier's rule, fair on its face," was the *joint rate* of 60c applicable to the agreed through route of the carriers. But, if it was changed, then the sum of the two local rates became the "rate" and we simply *ask the application of the rule.* As matter of law, a valid rate is "fair on its face," just and reasonable; *contra*, an illegal rate is *not* fair on its face, but unjust and unreasonable.

If the Act deprives State Courts of jurisdiction to ascertain as a fact a lawful interstate rate, the Federal Courts and the Commission are assuredly confronted with prospective litigation greatly dispro-

portionate to their time and facilities. And if a 25c conceded overcharge exist, must the wronged shipper in every case either incur the expense of going before the Commission, or entering the Federal Courts to obtain a refund? The basis of his claim is that the rate exacted is *unreasonable only because it is unlawful.*

In *Illinois C. R. Co. vs. Mulberry Hill Coal Co.* (1914) Mr. Justice Pitney said of jurisdiction, (the suit having been prosecuted in a State Court):

> "A judgment having been rendered for damages caused by the unjust discrimination in the distribution of cars, the carrier brought the case here, insisting (1) that the determination of the proper basis for the distribution of cars was a matter calling for the exercise of the administrative power of the Interstate Commerce Commission; (2) that no court had jurisdiction of an action for discriminatory allotment until after the Commission had determined that the established rule for distribution was improper; and (3) that no suit could be brought against an interstate carrier for damages occasioned by a failure to deliver cars, or for an unjust discrimination in distribution, *except in a court of the United States.* Upon a review of Sections 8 and 9 of the act to regulate commerce and of the proviso in Section 22, which declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at

common law or by statute, but the provisions of this Act are in addition to such remedies,' we held that while the act gave shippers new rights, it at the same time preserved existing causes of action; that it *did not supersede the jurisdiction of state courts* in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal Courts had otherwise been made exclusive; that in actions against railroad companies for unjust discrimination in interstate commerce where the rule of distribution itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Commission; but if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted in the state or the Federal courts. And because in that case the action was not based upon the ground that the carrier's rule of car distribution was unreasonable or discriminatory, but that plaintiff was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled even upon the basis of the carrier's own rule of distribution, it was held that the state court had jurisdiction with-

out previous application to the Interstate Commerce Commission.

It is true that the Puritan Case arose before the passage of the Hepburn act in 1906; *but there is nothing in the amendments introduced by that act to affect the jurisdiction of the state court in an action such as the present.*"

The "carrier's rule" is the *legal rate* it has promulgated.

The answers *admit*, and the proof is undisputed, that there was a valid 60c joint rate existing to March 5, 1907. If a *suggestion* in pleadings and proof that it was changed deprives a state court of jurisdiction to *determine the fact*, there is no error in this record. Otherwise, the Tennessee court erred in its construction of the Act, and denied to the shipper a right asserted thereunder.

II.

If the state court had jurisdiction of the subject matter, did the *separate action* of N. C. & St. L. in subsequently filing the schedule containing the 70c rate supersede, cancel or suspend the previous joint rate? Secondly, if such action destroyed the *joint* rate, did it *substitute* a 70c *joint* rate—or did it simply make operative the local rates?

Section 6 of the Act as amended June 29, 1906, with some detail, shows how joint rates may be changed, providing:

> "No change shall be made in the rates, fares, and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or changes will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirement of this section in respect to publishing, posting and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.
>
> "The names of the several carriers which are parties to any *joint* tariff shall be specified therein and *each* of the parties thereto, other than the one filing the same, shall file with the Commission such *evidence* of *concurrence* therein or acceptance thereof as may be required or *approved* by the Commission and where such

evidence of concurrence or *acceptance is filed*, it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

This provision seems to but declare the original intent of the Act. By it Congress *ordains* there shall be *in fact a concurrence*, and also shall be filed with the Commission "such evidence of concurrence" in a joint rate "as may be required or approved by the Commission." It does not appear that *after* June, 1906, and prior to the separate action of N. C. & St. L. the Commission ruled as to what was sufficient "evidence of concurrence" *in a case like this.* But it does not admit of argument that a "*concurrence*" was necessary. A tariff circular was introduced showing Commission rulings with respect to "Responsibilities of Carriers under Tariffs"; but it dealt with their responsibility *inter sese*, and not as respects shippers. The rulings involved cases where carriers had participated in rates promulgated and acted on for years, and then attempted to hold other participants for an undue proportion of the total charge. To this end they claimed an application of their own local rates *because* there was no available evidence of *express* concurrence by them in the joint rate under which they had handled shipments. The Commission ruling in such cases was that relief would be denied at so late a day, when express concurrence might have become lost.

Present case presents an entirely different question and one on which we think the courts and text writers are not at variance. The distinction is drawn in *Camden Iron Works vs. U. S.*, 158 F. 561, where it was said:

> "It may be conceded, as the Court below held, that participation by one of several carriers in a rate named in tariffs filed by others of them is evidence of a lawful rate as against such participating carrier; but we cannot assent to the instruction which was given to the jury in this case, that participation was evidence of a *lawful* rate as against this shipper, the Camden Iron Works."

The Act says "each of the *parties thereto*," (referring to change of a joint rate) shall file concurrences. Cincinnati Southern did not in fact concur. *To concur implies assent*—the meeting of minds and views.

In *Black Horse Tobacco Co. vs. I. C. Railroad Co., et al.*, 17 I. C. C. Rep., 588, the Commission ruled that the initial carrier could not establish a *joint* rate contrary to the pre-existing rate, but that a *concurrence* of the connecting carrier was necessary. Defining its views as to a concurrence, the Commission said:

> "Assuming that a through rate could be constructed by the filing independently of the same

tariff by these different lines, that, in the case before us, had not been done. The minds of these two parties had *not met* upon any tariff; nor had they *concurrently* established the same tariff."

And Judson on Interstate Commerce, (Sec. Ed.), Sec. 313-4, says:

"A *through* route is a continuous line of railway formed by an arrangement, expressed or implied, between the connecting carriers. * * * * A through route must have a through rate for every service that it offers. If a through rate is established, notice must be given to the world of such arrangement by publication. If no through rate is established over a through route, the sum of the locals will make up the rate. 5 I. C. C. R. 44, 3 Int. Com. Rep. 706. * * *

When railroad companies make a through and continuous line and offer it for the use of the public, the Commission has ruled that they cannot rid themselves of responsibility for unjust charges by breaking the haul in two and calling themselves carriers of the separate ends of their through line. * * * *

In the absence of some agreement or understanding with a connecting line, by which the joint tariff rates are authorized, the carrier cannot lawfully publish or apply any other rates than those fixed for transportation between the

points reached by its railroads; and it cannot publish the sum as a rate to points on the line of any carrier without its consent. Such a through rate is *not a joint rate, for joint rates can be made only by concurrence or assent*, and it is not a combination rate, for one of its component parts is not a subject for a separate charge."

As observed by Circuit Court of Appeals for Sixth Circuit, in *Louisville & N. R. Co. vs. Dickerson*, 191 F. 709:

> "By Section 15 the Commission is authorized, on complaint made, to establish through routes and joint rates when necessary for the protection of shippers against the failure of carriers to establish such routes and rates, as well as the terms and conditions upon which such through routes shall be operated. (34 St. L. 590.) The *route* so established, whether by the Commission or by the voluntary act of the carriers, becomes a *unit*, and the rate is likewise unitary. *Pacific Purchasing Co. vs. C. & N. W. Ry. Co.*, 12 I. C. C. R. 549, 552."

In this case the Commission was not compelled to "establish" a through route and joint rate, as it is conceded in pleadings and proof that the carriers by compact established both, and their action was approved by the Commission. Could one of the carrier participants thereafter (a) abrogate such joint rate and (b) substitute a *new "joint" rate?* If the route

and rate established by "voluntary act of the carriers becomes a 'unit,' " it may well be doubted whether such route and rate can be changed by one of the carriers over objection of the others save on a special hearing before the Commission. In Louisville etc. Co. vs. Dickerson, *supra*, of such a rate, the court said:

> "A rate once regularly published is no longer merely a rate imposed by the carrier, but becomes a *rate imposed by law;* and routes and rates once so established become matter of public right and forbid private contract inconsistent therewith."

Cincinnati Southern from the beginning and continuing throughout the controverted period, carried the through route and joint rate of 60c per ton on its tariff, (R. 140, 34, 67-9). And while its officers considered having its "tariff put in line" with the schedule proposed by N. C. & St. L. in February, 1907, *they persistently refused to do so.*

The shipper did not participate, on the contrary it ever observed the 60c rate. Cincinnati Southern did not participate, but had the "division sheets" corrected to show 60c, and N. C. & St. L. participated on that basis. (R. 67-8.)

Wherefore, if we concede the action of N. C. & St. L., publishing a new rate without notice to Cincinnati Southern, while the latter continued to publish

the old (and to revise division sheets to conform) operated to change the joint rate, what followed? Was one joint rate destroyed and another substituted *against the will* of Cincinnati Southern? It is fundamental that when a pact is entered into its terms cannot be materially changed and the pact continued except by *consent* of all parties thereto.

Does the Act contemplate that an agreed joint rate may be changed by the initial carrier over the protest of *a "party thereto"?* We find no authority for such practice. Mr. Judson says, (Sec. Ed.) Section 315:

> "The only rates, which the carrier is authorized to publish, are its own legal rates, that is, to points on its own line, and such through rates, as it is authorized by agreement with any connecting carrier to combine with the rates of such carrier to points on its line.
>
> It cannot lawfully add to the duly established rates of another carrier any amount it pleases less than its own local rates, and publish and use them the same as a through rate to points on the line of another carrier without its consent. Such a through rate is not a joint rate, for joint rates can be made only by *concurrence or assent;* nor is it a combination rate, for one of its component parts has no legal existence or sanction as a through rate or through charge."

It seems the only change in a joint rate it is possible for a carrier to work by filling new schedules with the Commission, is to destroy the pre-existing joint rate, and possibly the through route. Particularly where the connecting carriers oppose the action and deny its binding force.

If N. C. & St. L. could not abrogate the old and substitute a new joint rate over the protest of Cincinnati Southern; and if we concede its action in February-March, 1907, destroyed the previous joint rate and through route—then the sum of the local rates became applicable, and this was 60c throughout the period of controversy. (R. 130-132, 133-137, 20, 140.) And when N. C. & St. L. received the ore, no difference at what rate it was billed, *in law* it was received and forwarded at the rate fixed by law—the sum of the locals.

In *Chicago B. & Q. Co. vs. United States*, 157 F., 830, (8th Circuit), the Court said:

> "The initial carrier which receives traffic and issues a bill of lading to ultimate destination should be held to have done so in view of the only rate which its connections are authorized by law to charge. The Commerce Commission has held (2 I. C. C. R. 656) 'when no authorized tariff is filed, the rates on traffic carried over or upon more than one line will be the sum of the

local rates of the individual roads, or of local and joint rates, as the case may be.' "

It was conceded that in the absence of a different or joint rate, the lawful one was "the lowest combination of rates applicable via the route over which the shipment moves." (R. 144.)

We agree with all the Supreme Court of Tennessee said about the permanency of rates, and that a lawful rate could not be changed by the carrier quoting a different rate—because the shipper is presumed to know the lawful rate.

We do not agree with it that complainant can successfully "present its claim for reparation before the Interstate Commerce Commission," (R. 155)—but this is immaterial, because if the shipper has slept on its rights that does not change the law. It may be true, as the Tennessee court observed, that "complainant is not without redress," for that "There is a suit pending between complainant and C. N. O. & T. P. Ry. Co. in the Federal Court at Cincinnati." (R. 155.) That suit is suspended for the present—and if the 60c rate is the lawful one, Dayton Company may undoubtedly have advantage of this in its future defense. But the parties concede the province of Chancery under Tennessee practice to take jurisdiction where it can reduce multiplicity of litigation. And as in this case, bring in necessary third

parties that all rights may be settled. We apprehend all parties here desire a settlement of accounts at issue rather than indulge the circuity of trial at Cincinnati and then, in one aspect, a new litigation between the carriers result.

If 60c was the lawful rate during ore deliveries—whether because the original joint rate remained unchanged, or, as a result of the change therein, whereby the sum of the locals became effective—the merits hereof are with plaintiff in error. In this view we ask an appropriate direction to the Honorable Supreme Court of Tennessee.

Respectfully submitted,

W. B. MILLER,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 81.

THE DAYTON COAL & IRON COMPANY, LTD.,
PLAINTIFF IN ERROR,

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, AND WESTERN & ATLANTIC RAILROAD COMPANY,
DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF TENNESSEE.

BRIEF ON BEHALF OF NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY AND WESTERN & ATLANTIC RAILROAD COMPANY.

FOSTER V. BROWN,
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Attorneys.

CLAUDE WALLER,
Of Counsel.

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MOTION TO DISMISS.

Defendant in error, the Nashville, Chattanooga & St. Louis Railway, moves to dismiss the writ of error and for a consequent affirmance because no right, title, privilege or immunity especially set up or claimed by the plaintiff in error under any statute of the United States was denied by the State court.

BRIEF ON THE MOTION.

The original bill in equity filed by the plaintiff in error in the chancery court alleged as grounds for the relief sought against the defendants in error: that (1) the defendants in error had published and filed with the Interstate Commerce Commission a rate of 60 cents per ton upon iron ore from Cartersville and other points in Georgia upon the Western & Atlantic Railroad, operated by the Nashville, Chattanooga & St. Louis Railway, to Dayton, Tennessee, upon the Cincinnati, New Orleans & Texas Pacific Railway, and that this rate was effective about November 6, 1903; which rate, it was alleged, had been quoted to the plaintiff in error and was binding upon both the defendants in error, and that (2) during the same period of time there was effective between Cartersville and other points in Georgia and Chattanooga, Tennessee, the point of connection between the Western & Atlantic Railroad and the Cincinnati, New Orleans & Texas Pacific Railway, a local rate of 40 cents per ton, and from Chattanooga, Tennessee, to Dayton, Tennessee, a local rate of 40 cents per ton, and that consequently the action of the defendants in error in undertaking to increase the joint rate to the extent of 10 cents per ton, leaving the local rate unchanged, was "a concession to plaintiff in error's competitors, and therefore discriminating and unlawful" (Tr., p. 7).

It is not anywhere asserted in the original bill (Tr., pp. 2-8) or in the amendment to the same (Tr., pp. 11-12) or in the answer filed by the plaintiff in error to the cross-bill of the defendant in error C., N. O. & T. P. Ry. (T., pp. 109-110) that the publication and filing of the rate of 60 cents per ton relied on as the basis of its complaint gave it any right under the Act to Regulate Commerce or any other Federal statute. In the pleadings filed by the plaintiff in error a recovery was sought purely upon equitable and common-

The Cincinnati, New Orleans & Texas Pacific Railway did not specifically give its assent to the publication and filing of the Schedule No. 8 by filing a concurrence with the Interstate Commerce Commission immediately thereafter, but it did, on August 23, 1907, file with the Interstate Commerce Commission a concurrence in the publication and filing of any freight-rate schedule thereafter filed by the defendant in error Nashville, Chattanooga & St. Louis Railway (Tr., p. 127), and defendant in error continued after the publication of this concurrence to republish and refile schedules showing a rate of 70 cents per ton upon iron ore from points in Georgia to Dayton, Tennessee (Copy Schedule, Tr., pp. 119 to 126, inc.).

Before March, 1907, and up until May, 1907, when an initial carrier published a joint rate on interstate traffic it showed on the title page, as was shown in this instance, a list of the carriers participating in said joint rate, and it was not customary prior to the time mentioned for the connecting carriers to file with the Interstate Commerce Commission or with the initial carrier any express assent to the use of its name as a participating carrier (Depo. Claggert, Tr., p. 46; Depo. Hayes, Tr., p. 91; I. C. C. Ruling, Tr., p. 144).

This was the rule as understood by the carriers (Depo. Claggert, Tr., pp. 46-47; Depo. Hayes, Tr., p. 90).

The Interstate Commerce Commission, although given full power to require concurrences by the Hepburn amendment to section 6 of the act, did not, until May, 1907, require concurrences to be filed by connecting carriers, and it was not, until May, 1909, after the shipments in this case had ceased to move, that the Commission declared that joint freight tariffs published and filed, in which carriers named in the schedule as participants had not filed concurrences, would be unlawful (Ruling of Commission, Tr., pp. 144-146).

On April 19, 1907, the agent of the Cincinnati, New Orleans & Texas Pacific Railway, in response to an inquiry of

the plaintiff in error, quoted a rate of 60 cents per ton upon iron ore from Cartersville, Georgia, to Dayton, Tennessee. Before naming this rate the agent communicated with the general freight office of his company in Cincinnati and was erroneously advised that such was the rate (Tr., p. 28). At that time a copy of the advanced rate of 70 cents per ton had been received in the office of that company at Cincinnati, but had been overlooked. The reason for this mistake is stated in a letter written by the vice-president of that company. The letter states:

> "The tariff was received through the usual course and referred to the desk in charge of the clerk previously mentioned who appears, however, to have never checked the tariff but simply to have put it into the foreign file case, allowing our raw material tariff to remain unchanged, whereas he should have checked it and made the necessary corrections and given formal notice of the change in the rate" (Tr., p. 70).

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law principles, and no Federal right was either directly or indirectly invoked or relied upon.

The defendant in error in its answer alleged that before the shipments began to move it had published a rate of 70 cents per ton upon iron ore, which rate canceled and superseded the rate of 60 cents per ton between the points in controversy, and that under the Act to Regulate Commerce and amendments enacted by Congress this rate became the lawful rate which it was bound under the law to charge and from which it could not lawfully depart (Tr., pp. 17-22).

The Supreme Court of Tennessee considered the question as to whether it had jurisdiction to determine whether a schedule of rates published and filed with the Interstate Commerce Commission was reasonable or legally operative, but it does not appear from this opinion or from the decree of the court that the plaintiff in error was denied any Federal right claimed by it in that court or in the lower court. It appears from this opinion and from the pleadings filed by the parties that it was the defendant in error and not the plaintiff in error who had claimed a right under the Act to Regulate Commerce (Tr., p. 155).

It is not every case where a Federal statute has been construed by a State court that gives a right of review in this court. This court will not take jurisdiction to review the judgment of a State court construing a Federal statute unless the construction applied by the State court was unfavorable to that party who has specially set up or claimed a right under the statute.

Kizer *vs.* Texarkana & Ft. Smith Ry. Co., 179 U. S., 199.

Remington Paper Co. *vs.* Watson, 173 U. S., 443.

Olympia Mining Co. *vs.* Kerns, 236 U. S., 214.

Cleveland & Pittsburg R. R. *vs.* City of Cleveland, 235 U. S., 50.

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STATEMENT OF THE CASE.

Supplementing the statement of the case as contained in the brief filed on behalf of the plaintiff in error, we deem it necessary to make this further statement of the facts:

Prior to March 7, 1907, this defendant in error had published and maintained a rate of 60 cents per ton upon iron ore from Cartersville, Emerson, Rogers, and Bartow, Georgia, upon its Western & Atlantic Line to Dayton, Tennessee, upon the line of the Cincinnati, New Orleans & Texas Pacific Railway. The last tariff schedule carrying this rate was issued by this defendant in error October 31, 1906, effective December 4, 1906, being I. C. C. No. 1314-A, naming the Cincinnati, New Orleans & Texas Pacific Railway and others as participating carriers (Tr., 88, and Stipulation of Counsel).

The Cincinnati, New Orleans & Texas Pacific Railway had also filed with the Interstate Commerce Commission a schedule of rates bearing I. C. C. No. 3269 (Tr., p. 29), which contained rates upon iron ore from a large number of points upon the railways named in the tariff to stations upon its line. This schedule was a copy or reproduction of rates previously made and filed with the Commission by this defendant in error and other companies, and in filing this schedule the Cincinnati, New Orleans & Texas Pacific Railway was not undertaking to establish rates over the line of the defendant in error and the other railroad companies mentioned in the tariff, but published this schedule merely as matter of information to the public and to its agents (Tr., p. 51).

The defendant in error on October 5, 1906, filed a general concurrence with the Interstate Commerce Commission assenting to all joint tariffs thereafter filed by any carrier naming it as a party (Tr., p. 129).

The rate of 60 cents per ton, as established by this defendant in error, continued in force and effect until March 7, 1907, at which time it made a general revision of all of its

iron-ore rates to all furnace points not located upon its line of railway (Tr., p. 125).

On February 2, 1907, defendant in error issued a schedule containing joint rates upon iron ore from the points referred to above in Georgia to Dayton, Tennessee, called Iron Ore Tariff No. 8, which advanced the joint rate upon iron ore from Cartersville and other points in Georgia to Dayton, Tennessee, from 60 cents to 70 cents per ton. This schedule was filed with the Interstate Commerce Commission on February 4, 1907, to become effective March 7, 1907. The schedule shows on its face that it superseded I. C. C. No. 1314-A, which established a rate of 60 cents per ton between the same points, that it was issued in connection with the Cincinnati, New Orleans & Texas Pacific Railway and other carriers, and named rates from points upon the line of this defendant in error in Alabama, Georgia, and Tennessee, to points upon the line or lines of carriers named therein as participants in Alabama, Georgia, and Tennessee. (Copy Schedule, Tr., p. 36; Certified Copy Schedule, Tr., pp. 120 and 124, and Stipulation of Counsel.)

Copies of this schedule were sent to the offices of the company at Cartersville, Emerson, Bartow, and Rogers, Georgia, where they were kept on file and were accessible to the public (Tr., 84, Agreement of Counsel; Tr., p. 87), and a copy of the schedule was sent to the general freight office of the Cincinnati, New Orleans & Texas Pacific Railway, where it was received and filed on February 5, 1907 (Tr., pp. 47 and 62).

This schedule did not change the earnings of the Cincinnati, New Orleans & Texas Pacific Railway from Chattanooga to Dayton, Tennessee, its proportion of the rate—20 cents per ton—remaining the same as in Iron Ore Tariff No. 7 and in previous tariffs. The change made was an advance in the rate of freight from Cartersville and other points to Chattanooga, which was increased from 40 cents to 50 cents per ton (Division Basis, Tr., p. 102).

The Cincinnati, New Orleans & Texas Pacific Railway participated in Iron Ore Tariff No. 8, accepted traffic to Dayton and other points and made settlements in conformity with the provisions of the schedule (Tr., pp. 114-61).

When the plaintiff in error began its shipments from the Georgia points named, about the middle of April, 1907, through billings were issued and freight bills were rendered to that company by the Cincinnati, New Orleans & Texas Pacific Railway upon the basis of a freight rate of 70 cents per ton of 2240 pounds. When the bills were received plaintiff in error complained that a mistake had been made and that the freight rate was 60 cents per ton instead of 70 cents, and it made payments for all the iron ore hauled to the Cincinnati, New Orleans & Texas Pacific Railway at that rate, leaving a balance of 10 cents per ton unpaid. For the diffence of 10 cents per ton left unpaid a relief claim was made out by the Cincinnati, New Orleans & Texas Pacific Railway and a receipt taken from the plaintiff in error for the difference of 10 cents per ton. These receipts were issued and taken with the idea that the defendant in error could remit 10 cents per ton of its charges if it so desired, but the officials of the Cincinnati, New Orleans & Texas Pacific Railway never at any time accepted the view that any such adjustment could legally be made (Tr., p. 72-73).

This defendant in error has been fully paid for all the iron ore transported by it for the plaintiff in error from points in Georgia to Chattanooga at the rate of 70 cents per ton, the Cincinnati, New Orleans & Texas Pacific Railway having paid to it the sum of 50 cents per ton, which represented its proportional share of the haul under the divisional basis. Settlements were made for these shipments by the Cincinnati, New Orleans & Texas Pacific Railway at Chattanooga, Tennessee, the point of connection between the two companies, once a week during the time the shipments were moving (Depo. Stanfield, Tr., p. 114; Depo. Claggert, Tr., p. 61).

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BRIEF.

The State court did not possess jurisdiction to determine the reasonableness or the lawfulness of a schedule of interstate freight rates established and filed with the Interstate Commerce Commission or to annul such rate.

The Supreme Court of Tennessee properly held that it was without jurisdiction to pass upon the subject-matter of this suit, because the Act to Regulate Commerce provides a system for establishing, maintaining, and altering rate schedules and for redressing injuries, and has conferred exclusive jurisdiction upon the Interstate Commerce Commission created by the act to investigate complaints, adjust rates, and order reparation to injured parties.

This defendant in error having published and filed with the Interstate Commerce Commission in the manner provided by law a tariff schedule advancing the rate upon iron ore from 60 cents to 70 cents per ton was legally bound to charge and collect, and the plaintiff in error was bound to pay for, the freight transported in accordance with the provisions of this tariff, and it was not within the competency of the courts of Tennessee to set aside and annul the tariff. This power was confided exclusively to the Interstate Commerce Commission by the Act to Regulate Commerce, and it necessarily follows that the courts of Tennessee cannot relieve the plaintiff in error from the controlling effect of the rate filed with the Commission by the defendant in error. The plaintiff in error could only be relieved from the binding force of this rate by the action of the Interstate Commerce Commission.

Act to Regulate Commerce, 36 Statutes at Large, 379.
Amendment of March 2, 1889.
Amendment of June 29, 1906 (Hepburn Act).
Texas & Pacific Railway Company *vs.* Abilene Cotton Oil Co., 204 U. S., 426.
B. & O. R. R. Co. *vs.* Pitcairn Coal Co., 215 U. S., 481.
Robinson *vs.* B. & O. R. R. Co., 222 U. S., 506.
Mitchell Coal Co. *vs.* Penna. R. R. Co., 230 U. S., 247.

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The publication and filing of the rate of 70 cents per ton by the defendant in error, covering the transportation of iron ore between the points named therein, so long as it remained uncanceled by the Interstate Commerce Commission, was as fixed and unalterable, either by the shipper or by the carrier, as if that particular rate had been established by an act of Congress. After the filing of this rate it became the absolute duty of the plaintiff in error to assess and collect the freight charges specified therein, and it would have been unlawful for it to have collected any other or different rate.

Act to Regulate Commerce and Amendments, Elkins Amendment, 1903.

U. S. *vs.* New York Cent., etc., Ry. Co., 212 U. S., 509.

Armour Packing Co. *vs.* U. S., 209 U. S., 56, 83.

Penna. R. R. Co. *vs.* International Coal Co., 230 U. S., 184.

Mitchell Coal Co. *vs.* Railroad Co., 230 U. S., 247.

Boston & Me. R. R. *vs.* Hooker, 233 U. S., 97.

And the quotation of a rate or a contract for a rate less than the established rate or one afterwards established by the carrier is not binding upon the carrier.

Gulf, Colo., etc. Ry. *vs.* Hefley, 158 U. S., 98.

Armour Co. *vs.* U. S., 209 U. S., 56, 83.

Tex. & Pac. Ry. *vs.* Mugg, 202 U. S., 242.

Louisville & Nash. Ry. *vs.* Motley, 219 U. S., 467.

Illinois Cent. R. R. *vs.* Henderson Elevator Co., 226 U. S., 441.

Boston & Maine R. R. *vs.* Hooker, 233 U. S., 97.

Louisville & Nash. R. R. *vs.* Maxwell, 237 U. S., 99.

It has never been held by this court or any court that an actual concurrence was essential to the lawfulness or validity of a tariff established and filed with the Commission naming rates from points upon the line of the carrier filing the sched-

ule to points upon the line or lines of other carriers, and even stronger reasons against such a construction of the act of Congress would seem to exist here because at the time of the publication of the tariff in question no actual concurrence was required by the Interstate Commerce Commission (Ruling of Commission, Tr., p. 144).

The Abilene case, the Robinson case, the Pitcairn case, and other decisions of this court defining the scope and meaning of the Act to Regulate Commerce lay down the rule that when a tariff schedule has once been placed on file with the Interstate Commerce Commission it is beyond the power of the courts to disturb or annul such rate in the absence of a previous application to and action by the Commission. It has never been held in any of the cases dealing with the subject that the courts would acquire jurisdiction to pass upon the lawfulness of joint tariff rates in cases where connecting carriers named in the schedule had failed to concur therein, or that the failure of a connecting carrier to concur in a joint rate filed by an initial line would have the effect of relieving initial line of the duty of enforcing the provisions of the tariff. Neither the original Act to Regulate Commerce nor any of the amendments has made any such exception, and the Elkins law declares that any tariff "filed or participated in shall be conclusively deemed to be a legal rate."

> Amendment of 1913 (Elkins Law), 32 Statutes at Large, 849.

If the publication and filing of the increased joint rate by the defendant in error as the initial carrier, and the assessment and collection of freight charges thereunder in the absence of an actual written concurrence filed with the Commission by such carrier, although its share of the earnings remained the same as in the local tariff and as in superseded joint tariffs, was unlawful and violative of any of the provisions of the commerce act or of any of the amendments, the Commission under its power to secure an enforcement of the

provisions of the act possessed full and exclusive jurisdiction to declare the right and duties of the parties with respect to the application of the tariff (Sec. 13 of the commerce act, as amended by act approved June 18, 1910).

That an actual concurrence is not necessary to the lawfulness or validity of a joint freight rate was distinctly recognized by this court in the case of U. S. *vs.* New York Cent. R. R. Co., 212 U. S., 509, which was a criminal proceeding against the railroad company for rebating. It was contended that as the tariff schedule which was violated had not been filed and published by the defendant but by another railroad company, the company could not be prosecuted for the offense alleged in the indictment. In passing upon this objection to the indictment, it was held, that *under the Elkins law a carrier can be prosecuted for the offense of rebating, where it is a party to a joint rate although it has not filed or published the rate.*

Since the enactment of the Act to Regulate Commerce and the amendments thereto the Interstate Commerce Commission has uniformly exercised the jurisdiction and power to determine the reasonableness and legality of interstate freight rates, and has held *that joint through rates are legal, although not concurred in by the carriers named in the schedule.*

Robinson Paper Co. *vs.* Boston & Me. R. R., 21 I. C. C., 254.

Orders and Findings of the Commission, Tr., p. 140.

The circuit courts of the United States have ruled that participation by one of several carriers in a rate named in tariffs filed by others is evidence of the lawful rate as against such participating carrier, and that the initial line publishing such a tariff thereby becomes responsible to the shipper under the tariff.

Camden Iron Works *vs.* U. S., 158 Fed., 561.

Chicago, B. & Q. Ry. Co. *vs.* U. S., 157 Fed., 830.

In the latter case, which was decided in the Eighth Circuit, it was said that the rate to be applied where one carrier has established a joint rate which has not been sanctioned by the connecting line is the sum of the joint rate and the local rate, and that by "failing to establish or concur in a *joint* through rate for traffic accepted for interstate transportation, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged."

This case and the rule of construction applied was approved by this court in the case of Kansas City Sou. Ry. *vs.* Albers Comm. Co., 223 U. S., 573. (Both of these cases were decided after the ruling of the Commission upon the subject of concurrences by participating carriers and had reference to tariffs filed subsequent to such ruling.)

The Supreme Court of Tennessee Rightly Held that the 70-cent Rate Published and Filed by the Defendant in Error Was the Legal and Enforceable Rate.

The Supreme Court of Tennessee not only held that it had no jurisdiction of this suit, but it also held, distinctly and plainly, that if it was wrong in this conclusion it would still be bound to decide the case in favor of the plaintiff in error and dismiss the bill, for the reason that in its opinion the rate of 70 cents per ton, as published and filed by the defendant in error, was the legal rate (Opinion, Tr., p. 155).

The Act to Regulate Commerce as originally enacted did not require parties to joint tariff schedules to file concurrences in such tariffs, and the Hepburn amendment only required parties named in joint tariffs to file with the Commission "such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission." The Interstate Commerce Commission did not make any requirement or adopt any rule as to what evidence of con-

currence it would require until May, 1907, at which time it adopted the rule, which has since been enforced, requiring all carriers named as participants in a joint tariff to file a written concurrence with the Commission.

Sec. 6 of the Act to Regulate Commerce as Amended by Hepburn Act of 1906.

Ruling of Commission, Tr., p. 138; also Tr., p. 144.

The Commission in its ruling, which was issued November 15, 1907, recognized that rates filed prior to May, 1907, were lawful. In this ruling the Commission said that no uniform practice or rule was followed by carriers in regard to concurrences in joint tariffs prior to May, 1907, upon which date the Commission's freight tariff rules became effective. That the plan most generally followed was for each carrier to file with the Commission a statement that it thereby concurred in any tariff issued by any carrier and in which it was shown as a participant except when it gave to the Commission sufficient notice of non-concurrence in particular issues. That some carriers, however, did not file such a declaration and accepted traffic and settlements under joint tariffs in which they were shown as participants, although no concurrence therein had ever been given. *That the general, if not the universal, understanding and practice was that every carrier had a right to issue tariffs containing joint through rates or fares over lines of other carriers named therein as participants,* to note therein that the carriers named as participants would certify their concurrence to the Interstate Commerce Commission and for all to use such tariffs as in cases where carriers specifically certify to the Commission their non-concurrence in certain publications. That to undertake to check out and follow down definite and actual concurrences of carriers in tariffs issued prior to May, 1907, would be a hopeless task, and to declare unlawful all tariffs and participation therein which were not so definitely and actually concurred in, other than by use thereof, would

be to overthrow practically all such joint tariffs and leave transportation in chaos (Ruling Commission, Tr., p. 144).

The Commission did not, until March 2, 1909, make any order which would have the effect of nullifying the tariffs published prior to May, 1907, in which there had been no concurrence. On this date it was declared that the use of tariffs filed prior to May 1, 1907, would become unlawful after June 1, 1909, unless concurred in or unless superseded by other tariffs (Ruling, Tr., p. 146).

The rate attacked in this case was filed with the Commission on February 4, 1907, to become effective March 7, 1907. Every requirement of the law with respect to the making or filing of rates was complied with. Subsequent amendments were issued by defendant in error carrying the same rate (Tr., pp. 36, 120, 126; Stipulation of Counsel, Tr., pp. 119-120).

The rate of 70 cents per ton filed with the Commission by this defendant in error was the lawful and valid rate, and it was the duty of the Supreme Court of Tennessee to so hold upon the authority of the rulings of the tribunal charged with the administration of the Commerce Act as well as upon the authority of the decisions of this court construing the act.

ARGUMENT UPON AUTHORITIES SUBMITTED BY PLAINTIFF IN ERROR.

The authorities cited in plaintiff in error's brief are not in conflict with the construction of the Commerce Act as applied by the State court. The principle laid down in the case of Penna. R. R. Co. *vs.* Puritan Coal & Mining Co., 237 U. S., 131, and in Illinois Cent. R. R. *vs.* Mulberry Hill Coal Co. (1914), has not, as it seems to us, the remotest application to the question involved here. These were both suits for damages caused by the failure of the carrier to furnish shippers with coal cars in violation of the carrier's own rule with respect to the distribution of cars. It was said by the court in both cases that the court was merely called upon to decide a question of fact as to whether the carrier had violated the rule to the shipper's damage and that there was consequently no administrative question to be submitted to the Commission. This ruling in no way modifies the previous decisions of this court with respect to the exclusive jurisdiction of the Interstate Commerce Commission in the matter of annulling a rate filed regularly with the Commission. On the other hand, the decisions in these cases indicate approval of former rulings upon this subject. In the Puritan Coal case the court cites the case of Morrisdale Coal Co. *vs.* Penna. R. R., 230 U. S., 304, and points out the distinction which would exist if the rule of the carrier governing the distribution of cars had been attacked as unreasonable and discriminatory, as in the Morrisdale case, in which it was held, upon the insistence that the rule was unreasonable, that this was a question for the Commission and not for the courts.

It is not contended by the defendant in error that the State court would be deprived of jurisdiction to enforce a right arising under the Commerce Act upon "a suggestion in pleading and proof;" that it had filed a rate, the provisions of which governed the freight charges which had been as-

sessed. The contention was, and is, that when this rate was filed with the Commission it became the lawful rate as to defendant in error and the rate which it was bound to charge or suffer the penalty incident to a violation of the acts and amendments, and that the State court had no jurisdiction to annul this rate and to declare the 60-cent rate a lawful one.

It is not, and cannot be, questioned that the rate was regularly issued and filed. This fact is shown by the testimony of all the witnesses, and two copies of the schedule are introduced in the record, one at page 36 of the transcript and the other, a certified copy, at page 120, which, however, does not show the rate, and this omission is supplied by a stipulation of counsel, printed and filed with the record.

In order for the State court to have assumed jurisdiction in this case it would have had to declare this 70-cent rate unlawful, and thereby would have done the very thing which appellant concedes that it had not the power to do; that is, to "fix interstate rates or judge of their unreasonableness."

But, notwithstanding this concession, which is now made, it is apparent from the pleadings filed by plaintiff in error in the lower court that this was precisely the result which appellant sought to obtain in the chancery court of Hamilton County. It was there alleged that there was a 60-cent rate in force and filed with the Commission, and that the railroad companies were undertaking to charge a higher rate of 70 cents per ton, which was alleged to be an unreasonable, discriminatory and illegal rate. The defendant in error contended, as appears from the pleadings, that it had filed the 70-cent rate with the Interstate Commerce Commission, which canceled and superseded the 60-cent rate, and that the courts of Tennessee were without jurisdiction to set aside or annul such rate. The chancery court, taking plaintiff in error's view of its jurisdiction, held that the rate of 70 cents "was and is illegal, inequitable, and unenforceable as against appellants, and that complainant was entitled to the 60-cent rate, as contended for by it herein." The Supreme Court of Tennessee, upon appeal, held upon the authority

of the construction of the act by this court in the Abilene and other cases that it had no jurisdiction.

If the chancery court of Hamilton County had the power to pass a decree in this case declaring the rate published by the defendant illegal and unenforceable, then plaintiff in error would accomplish through the agency of the court the important things which the act of Congress was designed to defeat; that is, preferences and inequalities in the application of freight charges. Such a decree would render the rate ineffective in Tennessee, but the schedule carries rates not only in Tennessee but also in Alabama and Georgia. So that if the jurisdiction to decide this question is in the courts, this rate would be subjected to the conflicting views of the courts and juries of three different States. To open this jurisdiction to the courts would be to use the language of the Abilene case, "the absolute destruction of the act and the remedial provisions which it created."

The determination of the question as to whether a questioned rate is or is not a lawful rate, or whether the Commerce Act regulating the making and enforcement of freight rates, or the requirement of the Commission with respect to concurrences, have been complied with so as to make a rate lawful would be a question for the administrative power of the Commission in order that the intent and purpose of the act with respect to uniformity in the making and enforcement of rates might be attained. It would be subversive of the very intent and meaning of the act to subject the making of rates to the divergent views of the State courts, the result of which would be to destroy all uniformity in tariffs. Such jurisdiction would be even more destructive of the intention of the act than the power to pass upon questions as to the unreasonable character of rates.

The Commerce Act makes it obligatory upon carriers to file tariffs containing their local and through rates. Section 15 of the act provides that when a new rate is filed the Commission may, upon complaint or upon its own initiative, upon notice to the carrier, at once enter upon a hearing con-

cerning the propriety of the rate, regulation or practice, but the Commission may not reject any schedule offered except when "it does not provide or give lawful notice of its effective date," when such schedule "shall be void and its use unlawful" (Sec. 6 of the Amendment).

In only this one instance does the act undertake to declare that any rate offered for filing or filed with the Commission shall be unlawful.

The Elkins amendment, which was enacted to strengthen the provisions of the Commerce Act and its amendments and to enable the courts to enforce the provisions of the act, forbids any departure from *any* tariff filed under the provisions of the act. This is made an absolute duty, and no exception is made in the case of joint rates not concurred in by connecting lines. After filing this rate the defendant in error could not, without committing an offense under this amendment, have charged any less than the rate specified in its Iron Ore Tariff No. 8, that is, 70 cents per ton.

II.

If the State court, in fact, had the jurisdiction to determine whether or not the 70-cent rate was legally operative it is said that this court decided the question wrongly, because the 70-cent rate did not supersede the prior rate of 60 cents filed by the initial line and also by the Cincinnati, New Orleans & Texas Pacific Railway. The Cincinnati, New Orleans & Texas Pacific Railway had filed a copy of this 60-cent tariff, which was apparently the practice of some carriers prior to the passage of the Hepburn amendment providing that it should no longer be necessary for carriers filing concurrences to also file copies of the tariffs (Tr., p. 29).

This schedule of rates was published and filed by the Cincinnati, New Orleans & Texas Pacific Railway to conform to the schedule of rates as then established by the defendant

in error Nashville, Chattanooga & St. Louis Railway, and was not published with any claim or intention on the part of that company to make rates over the line of the Nashville, Chattanooga & St. Louis Railway, the initial carrier, as to these shipments. It was merely a copy or reproduction of the Nashville, Chattanooga & St. Louis Railway Company's tariff and was published as a matter of information to the public and to the agents of the company. This was the testimony of F. D. Claggert, assistant general freight agent of the Cincinnati, New Orleans & Texas Pacific Railway (Rec., pp. 50-51).

We do not find in the Commerce Act as originally enacted, or as amended, any mention of any intent that connecting carriers should file concurrences, or any reference to this subject until the passage of the Hepburn amendment, when it was required that each of the parties to a joint tariff "shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission." There is not anywhere in this section an absolute requirement that any actual concurrence in a joint tariff published and filed by initial lines shall be necessary to make such joint tariffs lawful and effective.

The decision of the Commerce Commission on November 15, 1907, with respect to the responsibilities of carriers in tariffs filed prior to May, 1907, does not furnish any ground for the argument that any concurrence was required except such as might be required or approved by the Commission, and there was no warrant in the language used by the Commission in this ruling for the conclusion that the decision was intended to be restricted merely to responsibilities of carriers *inter sese*. Without regard to how the question happened to arise before the Commission, which is certainly not disclosed in this ruling, if the Commission had the power to make the declaration, which cannot be questioned, and which, in fact, is not questioned, the rule announced would clearly be binding upon the carriers, whether dealing be-

tween themselves or with shippers. The declaration of the Commission, as finally summed up, was "to undertake now to check out and follow down definite and actual concurrences of carriers in tariffs issued prior to May 1, 1907, would be a hopeless task, and to declare unlawful all tariffs and participation therein which were not so definitely and actually concurred in other than by use thereof, would be to overthrow practically all such joint tariffs and leave transportation in chaos," and it was not until March 2, 1909, that the Commission held that the tariffs on file prior to May 1, 1907, as to which specific participation and concurrence were not shown would be held canceled on or before June 1, 1909 (Ruling, Tr., pp. 145-146).

The tariff in question, even if no concurrence had been filed on August 23, 1907, would, according to this ruling, have been a lawful tariff up until June, 1909, and the shipments involved in this suit all moved prior to that time (Tr., p. 55).

The case of Camden Iron Works *vs.* U. S., 158 Fed., 561, is not authority to support plaintiff in error's contention as to the proper construction of the Commerce Act. This was a prosecution against the Iron Works for receiving a rebate from the Transit Water Company from a rate which was published and filed by certain railroad companies naming the transit company as a participating carrier, and it was held by the court that the participation in the transportation of the property under through bills of lading and in the rate charged therein was not under a common arrangement between the carriers within the meaning of the act so as to make the rate lawful as against the shipper, and this for the reason that the transit company was not subject to the act, *being a water carrier.* In passing on the question, however, the court used language clearly indicating that the conclusion of the court would have been different if the defendant had been a railroad company subject to the act and had participated in a joint rate filed by another. The court said this:

"In other words, we were not called upon to determine whether the Mutual Transit Company was required to file a tariff or join in those of the railroad companies or to file an acceptance of them; for to relieve the Camden Iron Works from the charge of crime, it suffices that none of these things was, in fact, done. *It may be conceded as the court below held, that participation by one of several carriers in a rate named in tariffs filed by others of them is evidence of a lawful rate as against such participating carrier,* but we cannot assent to the instruction which was given to the jury in this case that participation was evidence of a lawful rate not only as against the Transit Company, but also as against this shipper, the Camden Iron Works."

"If an initial carrier files and posts a rate making joint rates from stations upon its line to destination upon the connecting line in which tariff a connecting line does not concur, the initial line thereby becomes responsible to the shipper under the tariff."

The case of Blackhorse Tobacco Company *vs.* Illinois Central Railroad Company, 17 I. C. C. Reports, 588, is also cited to sustain the contention that an initial carrier cannot establish a joint rate contrary to a pre-existing rate without concurrence of the connecting carrier. This suit was brought in December, 1909, after the Commission had made its rules requiring concurrences and does not sustain the contention made in any aspect of the case. It was a direct application, made after the rules with respect to concurrences had gone into effect, and goes only to the extent of holding that where an initial carrier names a connecting line as a participant in a joint rate without authority from the connecting line, the publication is *unlawful as to the connecting line,* but it is distinctly held that where such publication was made by the initial line without authority from the connecting line *that the initial line was bound by the publication and would be compelled to carry freight in accordance with such tariffs,* which is precisely the contention we make.

The quotation from the case of the Louisville & N. R. R.

cs. Dickerson, 191 Fed., 701, states a sound principle and one which we do not question, but it does not by any sort of analogy reach the question here involved. If it be true, as argued, that a through route and joint rate of 60 cents per ton was established by the carriers, it certainly does not follow, under any construction of the Commerce Act, that the initial carrier could not, in the manner provided by the law, change the rate—at least that portion of it carrying a rate over its own line. A carrier, under the act, retains the primary right to make rates subject to the approval of the Commission if complaint should be made. The defendant in error exercised this right in the manner provided by the act. The filing of a schedule of rates by its connecting line containing a statement of its rates and operating as a concurrence, even if such action constituted the making of a joint rate, would clearly not operate to deprive the defendant in error of any right which it possessed under the statute to make rates upon its own line of railway, subject, of course, to the revising power of the Commission. The act makes it the duty of carriers to file rates and allows them to change such rates upon thirty days' notice, and the custom among carriers is for the initial line to make rates upon commodities shipped from points upon its line (Tr., p. 51), and unless there is an agreement to the contrary the initial carrier specifies that the participating carrier shall receive for its share of the haul that proportion of the rate which its own joint tariff then in force carries, and if none exists, then the joint rate filed by the initial line should carry the local rate of the carrier named as participant (dep. Claggert, Tr., p. 45). The Cincinnati, New Orleans & Texas Pacific had maintained a local rate of 20 cents per ton from Chattanooga to Dayton and it received this amount per ton under the 60-cent joint rate (Tr., p. 55). When this rate was superseded by the 70-cent rate the share of the Cincinnati, New Orleans & Texas Pacific Railway in the haul was not changed, but was

left at 20 cents per ton, as it had been prior to that time. This is shown upon the division sheet (Tr., p. 102).

It cannot be seriously controverted that the Cincinnati, New Orleans & Texas Pacific Railway Company participated in the new joint rate filed by this defendant in error. It cannot be disputed that the iron ore shipped, about which complaint was made in the original bill in this case, was shipped under billings from the points of origin to the point of destination carrying a rate of 70 cents per ton; that weekly settlements were actually made by the Cincinnati, New Orleans & Texas Pacific Railway with this defendant in error, and that freight charges of 50 cents per ton, as provided for by this rate, were actually paid to this defendant in error (Tr., pp. 61 and 114-115). Other shipments were made under this same rate to Rockwood, Tennessee, on the line of the Cincinnati, New Orleans & Texas Pacific Railway, but not to the plaintiff in error in this case (Tr., p. 118). The correspondence between the officers and agents of the defendants in error, which is made a prominent feature in the argument submitted on behalf of the appellant, is wholly irrelevant to the question presented. Such proof could only be competent in a direct proceeding instituted before the Interstate Commerce Commission for the purpose of having the rate declared unlawful or unreasonable. It does not, as introduced in this record, show any refusal on the part of the Cincinnati, New Orleans & Texas Pacific Railway to participate in this rate. The sum and substance of this correspondence merely is that the Cincinnati, New Orleans & Texas Pacific Railway had overlooked the copy of the No. 8 schedule which had been sent to it, and consequently did not revise its own tariff, and so made an erroneous quotation to the shipper with reference to the correct legal rate. The agents of the plaintiff in error and the railroad company at the point of destination seemed to have the view that the initial line could remit the excess of its earnings under the tariff over and above what was deemed to be a reasonable

charge, but when this question reached the officers of the company it was immediately recognized that the plaintiff in error was liable for the payment of the freight rate, and a suit was instituted to recover the undercharge due the company by the plaintiff in error. The defendant in error, the Cincinnati, New Orleans & Texas Pacific Railway, has never contended that the rate published and filed by the defendant in error, Nashville, Chattanooga & St. Louis Railway, was not the legal and lawful rate. On the other hand, its pleadings filed in the case maintain that it was a lawful rate. The testimony of its officials is that they recognized the right of the Nashville, Chattanooga & St. Louis Railway to advance the rate, and under the custom prevailing at that time it was not necessary for it to file a specific concurrence (Tr., pp. 46, 47, 48, 49).

Plaintiff in error concedes that it may be that the 70-cent schedule superseded the former schedule, but contends it would not establish a new rate, and that the sum of the local rates would be the lawful rate to be charged. This would present a serious inconsistency in rate-making, in view of the provisions of the act. If the later tariff superseded and repealed the former, then it was bound to become operative and the rates named would apply. If the former tariff was destroyed by the filing of the last one, the rate provisions of the latter would necessarily apply. The rate to be applied, assuming that concurrences were necessary to make a lawful joint rate, which, of course, we do not concede, would be the sum of the joint rate of the Nashville, Chattanooga & St. Louis Railway and the lawful local rate of the Cincinnati, New Orleans & Texas Pacific Railway from Chattanooga to Dayton, as declared in the case of Kansas City Sou. Ry. *vs.* Albers Comm. Co., *supra*.

The Supreme Court of Tennessee based its judgment as to the lawfulness of this rate upon the testimony of the witnesses that it was concurred in by the connecting line in the way in which joint tariffs were sanctioned at that time,

the rulings of the Interstate Commerce Commission in reference to such tariffs, the Act to Regulate Commerce and the amendments thereto, and the decisions of this court construing those statutes, and it is respectfully submitted that the judgment of that court was correct.

Respectfully submitted,

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